United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,132

CHRISTINE MITCHELL, *et al.*,

Appellants

v.

ROBERT S. McNAMARA, *et al.*,

Appellees

994

On Appeal From the United States District Court for the District of Columbia

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,132

CHRISTINE MITCHELL, CECIL DRIVER, JOHN ALIANO,
NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES,
a corporation, and
OVERSEAS EDUCATION ASSOCIATION,
an unincorporated association,

Appellants,

v.

ROBERT S. McNAMARA,
Secretary of Defense of the United States,
STEPHEN AILES,
Secretary of the Army,
PAUL H. NITZE,
Secretary of the Navy,
and
EUGENE M. ZUCKERT,
Secretary of the Air Force,

Appellees

JOINT APPENDIX

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JOINT APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CHRISTINE MITCHELL, ET AL v. ROBERT S. McNAMARA, Secretary of Defense, ET AL	C.A. No. 514-64 Mandamus and for a Declaratory Judgment and Injunctive Relief

RELEVANT DOCKET ENTRIES

1964

Mar. 2	Complaint, appearance, Exhibit A
Mar. 24	Interrogatories of pltfs to defts; c/m 3/24/64.
Apr. 24	Motion of defendants for protective order, P&A, c/m 4-24-64, MC 4-24-64, Appearance of John W. Douglas and Robert J. Wieferich.
Apr. 24	Motion of defendants to dismiss or in the alternative for summary judgment, brief, c/m 4-24-64, Exhibits A thru E.
May 6	Statement of material facts by defts., c/m 5-5-64
Jun 8	Order granting defts' motion to stay time for filing objections or answers to interrogatories until after defts' motion to dismiss, or, in the alternative for summary judgment has been decided, denying pltf's motion to extend time

to respond to Government's motion for judgment denied, and extending time for pltfs to respond to defts' motion to dismiss, or in the alternative, for summary judgment to and including sixty days from this date. (N)
Curran, J.

Aug. 19 Motion of pltf for summary judgment; c/m 8-19-64; brief in support; statement; affidavits (2); exhibit A&B; MC 8-18-64.

Aug. 19 Opposition of pltf to motion to dismiss; c/m 8-19-64.

Oct. 30 Opposition of defendants to motion of plaintiff for summary judgment and memorandum in support of defendants motion to dismiss or for summary judgment, Exhibits A thru G, c/m 10-30-64.

Nov. 30 Order denying cross-motions for summary judgment & granting defts' motion to dismiss (N) Hart, J.

Dec. 10 Notice of appeal of plaintiffs; deposit by Beebe (Copy mailed to Robert J. Wieferich).

[Filed March 2, 1964]

COMPLAINT IN THE NATURE OF A PETITION FOR MANDAMUS AND FOR A DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. This Court has jurisdiction under 28 U.S.C. § 1331(a) (1958 ed.) and 28 U.S.C. § 1361 (1958 ed. Supp. IV). The matter in controversy herein exceeds $10,000, exclusive of interest and costs.

2. Plaintiff MITCHELL is an employee of the Department of the Army in a school for the dependent children of overseas servicemen at Frankfurt, Federal Republic of Germany.

3. Plaintiff DRIVER is an employee of the Department of the Air Force in a school for the dependent children of overseas servicemen at Oslo, Norway.

4. Plaintiff ALIANO is an employee of the Department of the Navy in a school for the dependent children of overseas servicemen at Naples, Italy.

5. Plaintiffs DRIVER, ALIANO and MITCHELL, in addition to suing in their individual capacities, sue in behalf of all other teachers similarly situated, and further sue as representatives of the membership of OVERSEAS EDUCATION ASSOCIATION, an unincorporated association.

6. Plaintiff OVERSEAS EDUCATION ASSOCIATION, a non-profit educational and charitable organization which works to promote and advance education in schools operated by the Department of Defense and the military services for the dependents of servicemen stationed overseas, sues in behalf of those of its members affected by the actions of Defendants as set out herein.

7. Plaintiff NATIONAL EDUCATION ASSOCIATION, a non-profit educational and charitable corporation chartered by Act of Congress in 1906, which works to promote and advance education in the United States, and outside the United States to the extent that citizens of the United States are involved, sues in behalf of those of its members affected by the actions of Defendants as set out herein.

8. Defendants administer the Overseas Dependents Schools system (hereinafter "ODS") for the children of the United States servicemen stationed in foreign countries. The 285 schools in this system provide education at the levels of grades 1 through 12, and are located in twenty-eight countries. The total enrollment in the system is approximately 150,000 pupils, and approximately 5,771 classroom teachers are employed.

9. On July 17, 1959, the President approved the "Defense Department Overseas Teachers Pay and Personnel Practices Act," 73 Stat. 213, 5 U.S.C. § § 2351-2358 (1958 ed. Supp. IV). This Act removes ODS classroom teachers from the classified Civil Service and requires that their compensation be fixed "in relation to the rates of basic compensation for similar positions in the United States, but no such rates of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal Government of the District of Columbia." 5 U.S.C. § 2353(c). The Act reflects a Congressional intent to compensate ODS teachers in an amount generally equal to that paid teachers in the United States.

10. The legislative history of the Act substantiates a Congressional intent to make employment conditions, including compensation, generally equal to those prevailing in the better school systems in the continental United States. It further reflects an expectation that ODS would thereby be improved by enabling the Government to employ better qualified teachers.

11. The Department of Defense so understood the statute, as reflected in formal and informal communications from its officials, in testimony before Congressional committees, and by the promulgation, on August 22, 1960, of its Salary Determination Procedures, Overseas Dependents School Teaching Positions Class 1 (Exhibit A hereto). The Procedures establish a method for setting the lowest salary rate of ODS teachers at the mean starting rate for teachers in urban school jurisdictions in the United States holding bachelor's degrees, rounded to the nearest five dollars (¶4, Comment 1(a), (b)). Annual longevity increases are to be equal to the mean increases enjoyed by the same United States teachers, again rounded to the nearest five dollars (¶4, Comment 1(c)). The Procedures further contemplate annual adjustments in the ODS salary schedule as comparable United States salaries change, subject

to rounding off (¶4, Comment 2). The Procedures remain in full force and effect.

12. Simultaneously with issuance of the Procedures (August 22, 1960), the Department of Defense established a salary schedule entirely consistent with the Procedures by fixing the salary of ODS teachers at an annual rate within five dollars of the annual salary paid to teachers in the United States, computed in accordance with the Procedures formula.

13. Despite repeated protests by Plaintiffs and other employees of ODS, Defendants thereafter and continuing to the present time have refused to reset salary schedules as required by the Act and the interpretive Procedures. (On October 28, 1963, Defendants did grant an increase of $100 per year to each ODS teacher. This increase, however, did not comply with the 1959 Act or the formula promulgated in the interpretive Procedures.)

14. The following table compares the salaries paid ODS teachers just prior to October 28, 1963* with the salaries of United States teachers (computed according to the Procedures for the years indicated). The latter are the salaries which ODS teachers were and are entitled to receive under the Act.

Years Of Service In The System	ODS Salary Scale	U.S. Salary Scale 1961-62	1962-63	1963-64
1st	$4,435	$4,665	$4,855	$4,855
2nd	4,620	4,850	5,055	5,055
3rd	4,805	5,035	5,255	5,255
4th	4,990	5,220	5,455	5,455
5th	5,175	5,405	5,655	5,655
6th	5,360	5,590	5,855	5,855
7th	5,545	5,775	6,055	6,055
8th	5,730	5,960	6,255	6,255
9th and following	5,915	6,145	6,455	6,455

* On that date an increase of $100, not in compliance with the 1959 Act, was granted. See ¶ 13, supra.

(None of the average United States salaries in the three columns on the right would have exceeded the maximum permitted by the 1959 Act, i.e., the highest rates of basic compensation for similar positions under the Government of the District of Columbia.)

15. As a result of Defendants' refusal to set ODS salaries in conformity with the Act, the individual Plaintiffs have been denied the compensation to which they are entitled under the Act, ODS has a turnover rate for teachers which is many times the United States average, and there has been a decrease in the educational qualifications of newly-hired teachers, all to the detriment of ODS and of immediate concern to Plaintiffs NATIONAL EDUCATION ASSOCIATION and OVERSEAS EDUCATION ASSOCIATION because of their charitable interest in preserving and improving the quality of education in overseas schools.

16. Defendants have refused to pay the salaries required by the 1959 Act because, in their view, they are restricted from so doing by the dollar limitation on expenditures per pupil in the annual appropriations acts for the Department of Defense, § 606, 73 Stat. 378-79 (1959); § 506, 74 Stat. 350 (1960); § 606, 75 Stat. 375-76 (1961); § 506, 76 Stat. 328 (1962); § 506, 77 Stat. 264 (1963).

The appropriations act for Fiscal 1960 (§ 606, 73 Stat. 378-79 (1959)) provided:

> "Appropriations for the Department of Defense for the current fiscal year shall be available. . . for primary and secondary schooling for minor dependents of military and civilian personnel of the Department of Defense residing on Military or naval installations or stationed in foreign countries. . . in amounts not exceeding an average of $265 per student, when the Secretary of the Department concerned finds that schools, if any, available in the locality, are unable to provide adequately

for the education of such dependents. . . ."

The appropriations acts in subsequent fiscal years provided per-pupil limitations of $275 (1961 and 1962); $280 (1963); and $285 (1964), all in substantially identical language.

17. The per-pupil limitation in the appropriations acts does not justify or permit Defendants' refusal to adjust ODS teachers salaries as required by the 1959 Act (5 U.S.C. § 2353(c)). There is no conflict or inconsistency between the 1959 Act, 5 U.S.C. § 2353(c), and the various appropriations acts. Simple multiplication of the amount of the limitation for Fiscal 1964 ($285) by the approximate total enrollment (150,000) produces a "fund" of $42,750,000 for operation of the system, a fund more than adequate to pay ODS teachers salaries in accordance with the 1959 Act as interpreted by the Procedures. Defendants have inherent discretion to administer ODS in such a way as to comply with all applicable Federal law. Defendants have, for example, never asserted the per-pupil limitation as a bar to full salary payment to the approximately 1800 professional employees of ODS not covered by the 1959 Act, whose compensation and benefits are governed by Civil Service statutes.

18. Defendants could, for example:

(a) Alter the categories of expenses chargeable to the "fund," a power exercised by them in Department of Defense Instruction No. 1342.5, dated October 28, 1957, which details the expenses so charged;

(b) Reduce non-personnel expenditures;

(c) Reduce the number, rather than the individual compensation, of ODS employees.

Plaintiffs assert no right to control Defendants' discretion in these matters, but cite these examples to illustrate that there is no conflict between the 1959

Act and the per-pupil limitations in the appropriations acts.

19. WHEREFORE, Plaintiffs pray:

(a) That an order in the nature of mandamus or a mandatory injunction issue, requiring Defendants to promulgate a new salary schedule for teachers employed in the Overseas Dependents School system in accordance with the 1959 Act, 5 U.S.C. § § 2351-2358, as interpreted by the Procedures;

(b) That the Court declare that the limitations in the various appropriation acts neither negate nor mitigate Defendants' obligation to fix ODS teachers' compensation pursuant to law;

(c) That the Court declare that the 1959 Act, 5 U.S.C. §§ 2351-2358, requires a periodic review of said compensation to maintain continuous compliance therewith; and

(d) Such other and further relief as the Court may deem just and proper.

/s/ William B. Beebe

/s/ Hershel Shanks

/s/ Clarke Frederick Hess

Attorneys for Plaintiffs

Of Counsel:
WEAVER AND GLASSIE
1527 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Exhibit A

U.S. Department of Defense
Washington 25, D.C.

DEPARTMENT OF DEFENSE
SALARY DETERMINATION PROCEDURES
OVERSEAS DEPENDENTS SCHOOL TEACHING
POSITIONS CLASS 1*

1. The compensation schedule will be reviewed annually.

COMMENT: It is recognized that many individual school districts review schedules each year and that a majority of the schedules are likely to be changed in any given year. It is recognized that to date the Classification Act and some other white collar pay plans have not been reviewed annually. It is customary, however, in government when wage schedules are administratively determined and related to prevailing rates, to provide an annual review. This procedure statement does not mean that the compensation schedule would be adjusted annually to reflect every increase, no matter how small, in the level of rates for teaching positions and this point is discussed later in this paper.

2. Review of the compensation schedule will be based on surveys of teaching position salaries conducted by the military departments, including the use of such authoritative salary data as may be available.

COMMENT: The military departments will conduct surveys of teachers salaries, extra curricular pay benefits and certain school administrative type positions as are necessary but will make maximum use of available authoritative data. The National Education Association collects and publishes data on salaries paid classroom teachers and school administrators in the

*These procedures relate to teaching positions as defined in DOD Instruction 1400.13.

United States. These publications are factual and can be used along with other appropriate data in determining overseas dependents school teachers' salaries.

3. Salary data for teaching positions will be obtained and analyzed on a timely basis and the results will be utilized to seek adjustment in the per pupil limitation sufficient to permit warranted increases in the compensation schedule.

COMMENT: It must be recognized that the per pupil limitation established by the Congress determines the maximum amount which can be spent in the operations of the dependents schools. Since salaries comprise a substantial part of operating costs it is expected that in the future the per pupil limitation will have to be increased before salaries can be adjusted. The most appropriate time to start administrative action to obtain an increase in the per pupil limitation is in August of each year, the time at which final budget preparation for the following fiscal year commences. This means that determination as to warranted salary adjustments must be made in July of each year.
NOTE: By Bureau of the Budget regulations the Department of Defense is not permitted to budget for anticipated increases in wages or salaries based on prevailing rates outside of the Federal Government. Only wage or salary schedules based on wages and salaries actually being paid can be considered.

4. The compensation schedule will be established and adjusted "in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia."

COMMENT 1: The above term will be applied as follows:

(a) Comparison for the purpose of establishing and adjusting the compensation schedule will be made with

rates of compensation in urban school jurisdictions of 100,000 population and over. Data from as large a proportion of these school jurisdictions as possible will be utilized.

(b) The beginning salary step [step (a)] of the compensation schedule will be related to the average (mean) of the entrance rates paid teachers holding a bachelor's degree, by establishing step (a) at this mean amount, rounded to the nearest five dollars.

(c) The size of the step rate increases will be related to the average (mean) of step rate increases in effect by fixing the step rate increase at the mean amount paid teachers holding a bachelor's degree, rounded to the nearest five dollars.

COMMENT 2: If teacher salaries continue to rise, as expected, then averages taken each year as provided above will show some upward change. This will be true even if only one of a few school districts grant increases. It is not administratively feasible to reflect very small increases. A reasonable figure, therefore, must be established as the minimum adjustment which will be made in any one year in the entrance rate and yearly increments, and only amounts which meet or exceed these minimums will be adopted. These minimum adjustment figures will be a hundred dollars at the first step and ten dollars for yearly increments.

COMMENT 3: A point may be reached where consideration will have to be given to a limitation on adjustments where such adjustments would result in those employees paid from the compensation schedule receiving a higher salary than their Classification Act supervisors.

5. When the per pupil limitation is known, final determination as to an appropriate adjustment will be made. Adjustments in the compensation schedule will be made coincident with the beginning of the school year.

COMMENT 1: It is planned that if the per pupil limitation is increased sufficiently to effect adjustments as

provided above, such adjustments will be ordered into effect. There may be times however, where the per pupil limitation will permit only part of the adjustment being made effective. Final determination of the adjustment, therefore, should await decision on the per pupil limitation.

COMMENT 2: From a management standpoint, the start of the school year seems to be the most appropriate time to place adjustments in effect. In passing, however, it should be noted that when adjustments are effected, new teachers will go on duty at a higher salary than had been indicated at the time they were recruited. It is understood that this is no problem, for at the time of recruitment, prospects can be told that the starting salary will not be less than last year's figures and (if adjustments have been proposed) it may be more. Recruiters, of course, can offer a certain figure during those years when adjustments are not being proposed.

[Filed April 24, 1964]

DEFENDANTS' MOTION FOR ORDER DISMISSING COMPLAINT OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

The defendants, by the undersigned attorneys, move the Court under Rule 12(b) of the Federal Rules of Civil Procedure for an order dismissing this action on the ground that this Court lacks jurisdiction thereof, or in the alternative for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing the complaint herein, on the following grounds:

1. The plaintiffs lack standing to sue the United States and their complaint fails to state a justiciable controversy between plaintiffs and the United States;

2. This is an action against officers of the United States which constitutes an action against the United States to which the United States has not consented; and

3. The issuance of the mandamus prayed for in this action would be an unauthorized interference with the discretionary functions of the Executive officers of the United States and a judicial interference with the Executive Branch of Government in violation of the constitutional separation of powers.

All as more fully set forth in the Brief of Defendants filed in support hereof.

/s/ John W. Douglas
Assistant Attorney General
Civil Division

/s/ David C. Acheson
United States Attorney
District of Columbia

/s/ Harland F. Leathers
Chief, General Litigation
Section Civil Division

/s/ Robert J. Wieferich
Attorney

[Filed May 6, 1964]

DEFENDANTS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Defendants, by their undersigned attorneys, state that there is no genuine issue concerning the following facts:

1. Plaintiff CHRISTINE MITCHELL is an employee of the Department of the Army in a school for the dependent children of overseas servicemen at Frankfurt, Federal Republic of Germany.

2. Plaintiff CECIL DRIVER is an employee of the Department of the Air Force in a school for the dependent children of overseas servicemen at Oslo, Norway.

3. Plaintiff JOHN ALIANO is an employee of the Department of the Navy in a school for the dependent children of overseas servicemen at Naples, Italy.

4. Plaintiff OVERSEAS FDUCATION ASSOCIATION is a non-profit educational and charitable organization which works to promote and advance education in schools operated by the Department of Defense and the military services for the dependents of servicemen stationed overseas.

5. Plaintiff NATIONAL FDUCATION ASSOCIATION is a non-profit educational and charitable corporation chartered by Act of Congress in 1906 which works to promote and advance education in the United States, and outside the United States to the extent that citizens of the United States are involved.

6. The Defendants are ROBERT S. McNAMARA, Secretary of Defense, STEPHEN AILES, Secretary of the Army, PAUL H. NITZE, Secretary of the Navy, and EUGENE M. ZUCKERT, Secretary of the Air Force.

7. Defendants administer the Overseas Dependents Schools system for the children of the United States servicemen stationed in foreign countries. The 285 schools in this system provide education at the levels of grades 1 through 12, and are located in twenty-eight countries. The total enrollment in the system is approximately 150,000 pupils, and approximately 5,771 classroom teachers are employed.

8. On July 17, 1959, the President approved the "Defense Department Overseas Teachers Pay and Personnel Practices Act," 73 Stat. 213, 5 U.S.C. §§ 2351-2358 (1958 ed. Supp. IV). This Act removes Overseas Dependents Schools classroom teachers from the classified Civil Service and requires that their compensation be fixed "in relation to the rates of basic compen-

sation for similar positions in the United States, but no such rates of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal Government of the District of Columbia." 5 U.S.C. § 2353(c).

9. The appropriation act for fiscal 1960 (§ 606, 73 Stat. 378-79 (1959)) provided:

> "Appropriations for the Department of Defense for the current fiscal year shall be available . . . for primary and secondary schooling for minor dependents of military and civilian personnel of the Department of Defense residing on Military or naval installations or stationed in foreign countries . . . in amounts not exceeding an average of $265 per student, when the Secretary of the Department concerned finds that schools, if any, available in the locality, are unable to provide adequately for the education of such dependents . . . ."

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/s/ John W. Douglas
Assistant Attorney General
Civil Division

/s/ Harland F. Leathers
Chief, General Litigation
Section, Civil Division

/s/ Robert J. Wieferich
Attorney

[Exhibit B 1)

OFFICE OF THE ASSISTANT SECRETARY
OF DEFENSE
Washington 25, D.C.

Manpower 31 August 1960

Mr. Robert W. McLain
Salary Consultant
National Education Association
1201 Sixteenth Street, N.W.
Washington 6, D C.

Dear Mr. McLain

This is to advise you that the military departments have adopted the salary determination procedures for overseas dependents schools teaching positions, Class I, developed in consultation with you and other officials representing the Overseas Education Association and agreed to verbally on 4 August 1960. A copy of these procedures is attached.

The military departments have applied these procedures in determining an appropriate salary schedule for the 1960-61 school year. A copy of the resulting schedule is also attached.

As you are aware, the Congress granted only a $10 adjustment in the per pupil limitation for fiscal 1960 instead of the $15 adjustment requested by the Department of Defense. Despite this fact, it has been determined that the revised salary schedule should be applied to the 1960-61 school year, and it has been made effective as of the first pay period in that school year. This decision may cause the military departments to postpone certain other desirable actions which would increase the charge against the per pupil limitation.

I have been advised that in the development of the new salary determination procedures you and Dr. Hazel Davis contributed greatly. We sincerely appreciate these

fine efforts and look forward to continued cooperation with your office in matters affecting the professional personnel of the overseas dependents schools.

Sincerely yours

/s/ Leon L. Wheeless
Staff Director
Civilian Personnel
Policy Division

[Exhibit B 2]

SALARY DETERMINATION PROCEDURES OVERSEAS DEPENDENTS SCHOOL TEACHING POSITIONS CLASS 1*

1. The compensation schedule will be reviewed annually.

COMMENT: It is recognized that many individual school districts review schedules each year and that a majority of the schedules are likely to be changed in any given year. It is recognized that to date the Classification Act and some other white collar pay plans have not been reviewed annually. It is customary, however, in government when wage schedules are administratively determined and related to prevailing rates, to provide an annual review. This procedure statement does not mean that the compensation schedule would be adjusted annually to reflect every increase, no matter how small, in the level of rates for teaching positions and this point is discussed later in this paper.

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COMMENT: The military departments will conduct surveys of teacher salaries, extra curricular pay benefits and certain school administrative type positions as

(* These procedures relate to teaching positions as defined in DOD Instruction 1400.13)

are necessary but will make maximum use of available authoritative data. The National Education Association collects and publishes data on salaries paid classroom teachers and school administrators in the United States. These publications are factual and can be used along with other appropriate data in determining overseas dependents school teachers' salaries.

3. Salary data for teaching positions will be obtained and analyzed on a timely basis and the results will be utilized to seek adjustment in the per pupil limitation sufficient to permit warranted increases in the compensation schedule.

COMMENT: It must be recognized that the per pupil limitation established by the Congress determines the maximum amount which can be spent in the operations of the dependents schools. Since salaries comprise a substantial part of operating costs it is expected that in the future the per pupil limitation will have to be increased before salaries can be adjusted. The most appropriate time to start administrative action to obtain an increase in the per pupil limitation is in August of each year, the time at which final budget preparation for the following fiscal year commences. This means that determination as to warranted salary adjustments must be made in July of each year.

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(c) The size of the step rate increases will be related to the average (mean) of step rate increases in effect by fixing the step rate increase at the mean amount paid teachers holding a bachelor's degree, rounded to the nearest five dollars.

COMMENT 2: If teacher salaries continue to rise, as expected, then averages taken each year as provided above will show some upward change. This will be true even if only one or a few school districts grant increases. If it is not administratively feasible to reflect very small increases, a reasonable figure, therefore, must be established as the minimum adjustment which will be made in any one year in the entrance rate and yearly increments, and only amounts which meet or exceed these minimums will be adopted. These minimum adjustment figures will be a hundred dollars at the first step and ten dollars for yearly increments.

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COMMENT 2: From a management standpoint, the start of the school year seems to be the most appropriate time to place adjustments in effect. In passing, however, it should be noted that when adjustments are effected, new teachers will go on duty at a salary higher than had been indicated at the time they were recruited. It is understood that this is no problem, for at the time of recruitment, prospects can be told that the starting salary will not be less than last year's figure and (if adjustments have been proposed) it may be more. Recruiters, of course, can offer a certain figure during these years when adjustments are not being proposed.

[Exhibit B]

AFFIDAVIT

WITH THE ARMED FORCES OF THE)
UNITED STATES OVERSEAS AT) SS.
APO 696, NEW YORK, N. Y.)

Miss Helen Marie Johanns, being first duly sworn, says:

That she is at present Assistant District Superintendent, United States Dependent Education Services, European Area, in charge of pupil personnel services.

That she has a Bachelor of Education degree from Whitewater State Teachers College, Wisconsin and a Master of Arts degree from Northwestern University, Evanston, Illinois, that she has been a teacher for fourteen years, an assistant to principals of high schools for six years, and for the last nine years has been discharging a variety of executive responsibilities concerned with school management and administration, personnel matters particularly.

That during her many years of experience in teacher personnel management, she has encountered and dealt with numerous personnel problems arising from the recruitment, assignment and reassignment of teachers and the rights and privileges of teachers, in both the military system and a typical civilian system, and is of the opinion that, in comparison, recruitment in the military system involves personnel problems very similar to those encountered in a civilian school district of comparable size, there being no great difference between the two, except that time and distance factors occasionally result in the late arrival of a teacher to the military system; this year, for example, the recruitment of teachers met with substantial success, although the military system encounters, as do civilian systems, difficulty in finding candidates for the "hard-to-fill" subject areas, (industrial arts, modern chemistry, etc.); that the assignment and reassignment practices in the military system create fewer teacher personnel problems for the principal reason that in the military system the teacher who has earned a satisfactory rating in his or her first year has an excellent and liberal opportunity to transfer to another country in the European area, and to do so annually thereafter at Government expense, and after two years, transfers to an area outside Europe are often effected at teacher option; and that the rights and privileges of teachers are equally respected in the military system.

That although she is familiar with teacher morale in the military system, she is not now familiar with teacher morale in civilian systems; but that she has noticed a de-

gree of deterioration of teacher morale in the military system due to a number of contributing factors, but one of which is salary and the others of which are problems of adjusting to working under a different system, being in foreign land, living in housing which is similar to dormitory life, and, for those in remote areas, adjusting to unfamiliar conditions.

That, in her opinion, the morale of teachers in the military system affects the quality of schools in no tangible respect. Actually, teachers in the military system are professional people in every sense of the term and do not permit personal frustrations to interfere with their basic task, the education of children.

That in the military system with which she is acquainted, the average teacher turnover is one-third annually, that she does not know whether this turnover is greater or less than that encountered in typical civilian systems; that turnover in a military system has obviously an effect on the continuity of the teaching staff; that teacher turnover in the military system is caused by many factors, one of which is salary; actually the principal factors are that many teachers come to us on but a one or two year leave of absence from a civilian system and feel a strong moral obligation to return, responsibilities to parents and becoming married are also important factors; that those teachers who do remain with the military system definitely do not lose touch with latest teaching methods developed in the United States; that those teachers who remain with the military system to avail themselves of opportunities to return to the United States for refresher and up dated training; and that teachers who do remain with the military system do not tend to become expatriate US citizens.

That the average overseas teacher is 31 years of age, has a least two years teaching experience, has no strong motivation for job tenure in the military system and is of course interested in salary, but is also interested in reward coming from the opportunity to live abroad.

That, compared to the average civilian system, the curriculum in the military system compares favorably; the teacher-pupil ratio is, because of differences in how military installations are constructed and equipped, and also because of the necessity for establishing small schools in some places, more difficult to maintain at a prescribed ratio; the military school system is probably better accredited in that all the high schools meet the accreditation standards of the North Central Association, the quality of the teachers if far better than in the civilian system, and the quality of the students is above that of those in the civilian system.

/s/ Helen Marie Johanns

I, Major Dwan V. Kerig, the undersigned officer, do hereby certify that the foregoing instrument was subscribed and sworn to before me this 25th day of September 1964 by Miss Helen Marie Johanns, whose permanent home address is 1205 Sheawin Ave, Chicago, Illinois and who is known to me to be a person serving with the U.S. Armed Forces. And I do further certify that I am at the date of this certificate a commissioned officer of the grade, branch of service, and organization stated below in the active service of the United States Armed Forces, that by statute no seal is required on this certificate, and same is executed in my capacity as a Judge Advocate.

/s/ Dwan V. Kerig
066172, Major, JAGC
JA Sec, Hq USAACOM
(MUNICH BRANCH)
APO 407, New York,
N.Y.

[Exhibit C]

AFFIDAVIT

I, Thomas M. Wilber, presently residing at Hebelstrasse, Hochsteteen/ Karlsruhe, Germany; permanent address c/o F. Herold, 18 Maryland Avenue, Middletown, New York, after having been duly sworn, do hereby make the following statement:

My name is Thomas M. Wilber and I have been employed by the US Army dependents schools system beginning July 1954.

I attended Syracuse University where I received an undergraduate degree in liberal arts (B.A.) with a major in science, in May, 1943. I then attended Syracuse University two subsequent semesters in 1947 and 1948 as a special graduate student and attended New York University, finishing the requirements for a Masters degree in the summer of 1958. The graduate degree is in education. My graduate work in education was essentially in the instructions of science with a minor in administration. I was in Europe as a Fullbright teacher in 1953-54 in Vlissengen and Middelburg, The Netherlands. I came to Germany in the summer of 1954, where I was employed by the US Army dependent school system. I completed my education by going back to the United States at my own expense. For five years I was a teacher at Frankfurt High School (1954-1959) where I taught high school sciences. For two years I was educational specialist in administration in the District Superintendent's Office in Frankfurt. I served as assistant principal in Frankfurt Elementary School #1 for one year. During the period 1959-64 I participated in two recruitment trips to the United States where we were involved in recruitment efforts in all portions of the United States. Since August 1962 I have been employed at the Central Office as Assistant Personnel Officer, Director of Personnel Recruitment and Placement, and Coordinator Special Projects, respectively.

In this capacity I have been involved in determining the personnel needs in order to staff the Army portion of the Army Overseas Dependent School system in Europe and to develop the requisition to obtain these personnel from the United States after certain refinements are made to allow for the local hire capacity. I also assist the personnel officer in the central office in all aspects of personnel administration, discuss personnel problems with administrators and teachers and negotiate with various civilian personnel offices throughout the command, including P&A Division, Headquarters, US Army, Europe, in such things as educational needs, rights duties and responsibilities of teachers in general. I am also responsible for the planning and carrying out of the initial reception and orientation of new recruits coming into overseas school systems. I meet almost all of the new teachers and make arrangements for travel to their processing stations. When unexpected or unanticipated vacancies occur in the teaching staffs of the various schools, my office has the responsibility of making the initial arrangements for hiring qualified replacements. These arrangements include locating personnel who may be in Europe as tourists, conducting interviews, ascertaining and evaluating their qualifications and making recommendations concerning their employment.

A. Question: How do personnel problems compare in portion of military system with which you are acquainted and civilian system with regard to recruiting, assignment, reassignment, rights and privileges?

Answer: The Army portion of the overseas school system in Europe has for the past two years recruited approximately 800 new teachers per year from the United States. These new teachers are recruited by negotiation between this directorate and the School Recruitment Office in Washington, D. C. Apparently recruitment officials in Washington, D. C., do not experience difficulty in obtaining sufficient applicants for most of the categories of teachers needed to staff the overseas

dependents schools. It is our understanding that recruitment is difficult in a few of the categories; specifically, remedial reading teachers, school librarians, industrial arts and physical education. Recruitment officials in Washington, D. C., would have accurate statistics regarding the recruitment program in the United States.

In addition to the teacher recruits obtained from the United States, the Army portion of the overseas school system in Europe usually recruits in the neighborhood of 300 local hires per year. These local hires come from two sources; namely, qualified dependents of military or DAC personnel and US tourists available in the overseas commands. It is considered to be an economical practice and in the best interests of the Government to set aside a certain percentage of expected vacancies for these local hires since this practice allows the utilization of services of those qualified teachers already present overseas. This saves the Government the expenditure normally accrued in transportation costs as well as furnishing dependents the satisfactory opportunity to contribute their professional skills. In addition to the economic factor, it provides the overseas school system with an important manpower reservoir which can be utilized in making personnel adjustments in relation to variations in the school population. Again, this directorate experiences no recruitment difficulties in filling the normal types of teaching categories through local resources. However, when late resignations are received from certain types of secondary teachers or special elementary teachers, considerable difficulty is faced by school officials in obtaining local replacements. It is felt, however, that these difficulties would be the same type as those faced by school officials in the United States who would be required to recruit teachers with special qualifications just prior to the beginning of a school year or after the schools are in session. This year's operation could be used as an example: Out of a work force of approximately 3,000 professional educators, we are experiencing difficulty in recruiting one industrial arts teacher, one teacher of the blind, one high school math-

ematics teacher and one elementary physical education coordinator. All of these requirements arose as a result of late resignations and none of these vacancies had been included with the original requisition developed by this directorate for new teachers from the United States.

As far as assignment and reassignment of professional personnel is concerned, it is my opinion that the overseas schools system faces a unique problem in relation to what would be the case in the United States. A large number of professional educators accept assignment in Europe in the first place because of their interest in travel to various European countries. These persons are very sensitive regarding their initial assignments and later reassignments. Naturally educators remaining with the overseas school system eventually gravitate to the more choice locations. This means that teachers new to the system are usually assigned to the more remote locations and the areas which are considered to be less choice. The assignment and reassignment problem has been discussed very thoroughly with teacher representatives in the past and it is felt that an effective assignment and reassignment procedure is being worked out based on an experience factor which has been developed over the past few years. Naturally educators resist reassignment out of the choice locations and these types of reassignments have only been accomplished after a considerable amount of discussion and counseling with those concerned. While teachers will usually accept reassignment after the school year is in session when the need for such reassignments have been made clear, the Army dependents school system has only effected three involuntary reassignment actions in the past, to the best of my knowledge. Educators employed by the overseas school systems have all of the rights and privileges accorded to them that are related to employment by the United States government overseas. As a matter of fact certain portions in the implementation of Public Law 86-91 provide educators employed under that law with certain advantages not enjoyed by other types of federal employees. For ex-

ample, PL 86-91 employees have a one-year transportation agreement and are able to take advantage of summer educational leave which amounts to a more advantageous reemployment leave type of travel. It has been my experience both as a teacher and administrator in the overseas school system that overseas educators in general normally enjoy at least as many rights and privileges in the overseas areas as they would had they remained in school systems in the United States. The logistic support given teachers overseas is that which is normally afforded to company grade officers of the military services.

B. Question: In your opinion, how does morale of teachers in military system compare with morale of teachers in other systems with which you are acquainted?

Answer: It is my opinion that the morale of the teachers in the military system has deteriorated over the past several years. While it is difficult to make an assessment as to just how the morale in general compares to teachers in other systems in the United States, I would say that newly recruited teachers approach their assignments with a great deal of enthusiasm and vigor. This enthusiasm seems, recently, to taper off as the new teachers become more exposed to the pressures, duties and responsibilities of their positions. Teaching in the overseas schools is not an easy task because of the many adjustments which must be made on the part of educators, both in community living and in coping with the differences which are inherent in dealing with new teaching situations. For example, a teacher accustomed to teaching in the United States in a stable situation may come to Europe anticipating that the same supplies will be available overseas as he was accustomed to in the United States. However, the supplies that he finds there, while even perhaps of better quality and in larger quantity, were ordered by his predecessors and may not be the ones which he feels are best suited to augment his educational ideas. Of course, this type of problem is faced whether a teacher accepts a new assignment overseas or

in the United States. The dissatisfaction that teachers express over such things as supplies may probably be attributed to this factor rather than any other.

C. Question: Does morale of teachers in military system, in your opinion, affect quality of schools?

Answer: It is my opinion that the quality of the educational program in the overseas schools has not been affected through a lowering of teacher morale. I believe that the main body of teachers employed by the dependents schools system is entirely too professional to allow its feelings to influence its best efforts in the class room.

D. Question: What is average teacher turnover in part of military system with which you are acquainted? How does this compare with other systems? Does turnover in military system adversely affect continuity of teaching staff? Is turnover in military system caused, in your opinion, by low salaries or other factors? Among teachers who do remain with military system, is there a problem resulting from their losing touch with latest teaching methods and developments in United States? Do those remaining with system, in fact, avail themselves of opportunities to return to United States for refresher and updated training? Do they tend to become expatriate US citizens?

Answer: Teacher turnover rate has remained quite stable over the past years. It seems to fluctuate between 30 to 40 percent of the total professional educators employed by the US Army in Europe. There is no doubt that this is a high turnover rate in comparison to the school systems with which I am familiar in the United States. Such a large turnover rate would naturally adversely affect the continuity of the teaching staffs. The turnover rate is not traceable entirely to dissatisfaction with working conditions or low salaries. Because of the unique situation inherent in employment overseas the overseas dependents school systems would probably face the same turnover problem in any event. Departing teachers have given the following reasons for resignation from the overseas school systems:

a. Professional commitments.

b. Family commitments.

c. To participate in further education.

d. Working conditions.

e. Low salary.

It is only in the last few years that dissatisfaction with salary has been identified more often than professional commitments as a reason for resignation. While I feel that it is quite true some teachers leave the dependent school systems overseas because of the inadequate salaries, I do not think that an increase in salary will greatly affect the turnover rate.

The implementation of the Department of Defense Directive 1400.13 authorizing summer educational leave has to a large extent alleviated the problem of teachers losing touch with latest teaching methods and developments in the United States. The way seems to be open to allow the overseas teachers to return periodically to the United States if they are pursuing a formal course of study there. A large number of teachers are taking advantage of the opportunity afforded them and this organization, during the past summer, was able to authorize this type of transportation in the case of all teachers who requested it other than those who had been employed for a period of only one school year. Summer educational leave together with reemployment leave provisions would seem to cure the problem resulting from teachers overseas losing contact with educational movements in the United States.

It is my opinion that only a negligible number of the professional educators employed by the Army in Europe tend to remain in Europe as expatriated US citizens, and I know of none such. Regardless of the length of service in the overseas areas the teachers with whom I am acquainted are patriotic United States citizens who take their teaching duties very seriously.

E. Question: How would you describe average overseas teacher compared to average teacher in other schools with which you are familiar, with reference to age, training, desire for job tenure and interest in salary versus other rewards resulting from assignment in foreign areas or from other sources?

Answer: It is my opinion that the "average" overseas teacher is an individual who is fully qualified both by training and experience. The quality of the overseas teachers has been emphasized in previous years by the representatives of the North Central Association of Colleges and Secondary Schools, who periodically visit the overseas schools systems for accreditation purposes. The overseas teachers are a younger group than their counterparts in the United States, but by far the largest percentage of them meet the full qualification requirements as established by Department of Defense, to include two years of successful experience. The school system with which I was concerned while in the United States certainly could not make the same claim since they customarily hired a number of inexperienced teachers each year.

While the vast majority of overseas school teachers are concerned with receiving an adequate salary, job tenure does not seem to be an important issue since most of them feel they have the security gained through employment with the United States government. The average teacher continues to carry out his teaching responsibilities even though he believes that he is not being paid the salary to which he is entitled. I hesitate to say that the rewards obtained through assignment in foreign areas overbalances salary considerations but I do believe that the average overseas teacher responds well to the challenges of his assignment and has developed in many instances an esprit de corps which causes him to continue in his efforts even though he is not receiving a salary which would be competitive with that which he would receive in the United States.

F. Question: How, in your opinion, do systems compare with regard to curriculum, teacher-pupil ratio, accreditation, quality of teachers and quality of students?

Answer: It is my opinion that the curriculum offerings of the overseas school systems compare favorably with those offered by average school systems in the United States. The difficulty in the overseas areas revolves around the lack of facilities and number of personnel required to implement some of the newer teaching techniques. Many of the better school systems in the United States would be much further advanced in this area.

The pupil-teacher ratio presently assigned to the overseas schools in the European area seriously handicaps the ability of overseas educators to adequately staff the schools as long as the following teaching categories are included in that pupil-teacher ratio: speech therapists, teachers of mentally or physically handicapped, reading improvement teachers, elementary physical education, health and music teachers. Because of the present pupil-teacher ratio (25:1) these essential specialist types may only be assigned to the very large schools and their services are almost non-existent in other locations. It is my opinion that the overseas schools will continue to retain accreditation because in order to obtain accreditation school systems must meet certain minimum requirements. It is evident that the overseas schools meet the minimum qualification requirements essential for accreditation, but if they are to become associated with the better educational systems in the United States much more support is required in terms of increased emphasis on physical facilities and a better adjustment of the pupil-teacher ratio. The quality of personnel is already high, but an increase in salary would positively affect the morale of the teachers and this would result in an even higher quality of personnel.

It has been my experience while involved in both classroom teaching and administration overseas that the students in the overseas school systems are of better than

average quality than one would find in average school systems in the United States. Test results have repeatedly shown that the students in the overseas schools do better than their counterparts in the United States. Of course, the term 'average' is very misleading and I doubt if any of us in the overseas areas is satisfied with merely 'average' results.

/s/ Thomas M. Wilber
Coordinator Special
Projects

[Notarial date, 23 Sept. 1964]

[Exhibit D]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRISTINE MITCHELL, et al., Plaintiffs,	)	
v.	)	Civil Action No. 514-64
ROBERT S. McNAMARA, et al., Defendants.	)	

AFFIDAVIT OF JOSEPH P. DEVINE

I, Joseph P. Devine, being duly sworn, depose and say that:

1. I am Superintendent of Schools in Newport, Rhode Island. I received my Bachelor of Education from Rhode Island Collage in 1951 and my Master of Arts in Educational Administration from the University of Notre Dame in 1954. I taught for three years in Rhode Island, three years in South Bend, Indiana, and one year in Naples, Italy. I was principal for three years at the Dependent School in Adana, Turkey, Incirlik AFB, and for one year

in England at Sculthorpe AFB. In 1961 I was appointed Superintendent of Schools in Jamestown, Rhode Island. I assumed my present position in 1964.

2. As far as I could ever learn the re-assignments overseas worked out quite well. The teachers in the most remote bases got an opportunity to move first. Every teacher in Turkey got his choice. In England this was a little more difficult. England was not considered remote, and many slots were filled from Turkey, Arabia,and South Africa before the England based teachers got their turns. In almost every instance, if a vacancy existed the teacher got it. For the most part, the people seemed to accept it well. Re-assignment at home is a very minor problem. In Newport where we have ten elementary schools, every teacher gets a chance to request a transfer to another school. We probably achieve as much satisfaction here as overseas. Both overseas and here at home we try to do it very openly so that the teacher does get his wish, or at least he understands why he didn't.

3. To the best of my knowledge, in comparing both sides of the ocean, the rights and privileges are just about the same. I can't think of a thing that would differ. For instance, both have the right of equal work for equal pay and the privilege of leave. Probably the leave privileges are slightly more liberal here at home. However, I never knew of a teacher overseas who wanted a day off for a good reason who didn't get it. In some of the remote bases, the teacher received a pay differential.

4. Generally speaking, the morale of the teachers is about the same in both places.

5. Overseas the problems resolve themselves into the same sort of thing. If there was a morale problem, it concerned the matter of quarters. Many women are concerned about where they live and rightfully so. Morale is a problem overseas by its nature. Sometimes these people were quite shocked and upset by the diverse local culture and the problems attendant upon processing into a base. Teachers generally get upset about supplies.

Overseas, we always had a little bit of a supply problem. Schools would be ready to open on September 5 and we would be without certain things. Similarly, we are without certain things now.

6. I don't know whether the authorities are ever going to solve the morale problem completely. The working conditions overseas can sometimes be grim. I taught in quonset huts with pot bellied stoves. Morale problems overseas stem partly from the nature of the geography, partly from home sickness, and partly from "culture shock." Pay always has an effect on morale. Most teachers welcome the opportunity to travel and especially to visit a particular country. In return they are willing to give their professional services. Most stay only a year or two or three. Most take a pay cut and get it back in other ways, for example in the quarters allowance. Morale positively affects everything a school system does. The morale factor probably stems more than anything else from the attitude of the school administrators and the base officials. Base commanders should pay more attention to it. In Turkey we had a most isolated base but had marvelous morale. All of the facilities of the base were open to us, and the school people were invited to participate in base affairs. In the dependent school system the teacher turnover is greater in the isolated areas than the central areas. The teacher turnover overseas is greater than here at home. The turnover of the teaching staff must have an adverse effect on a school's continuity. In the bigger locations where they have 60 or 70 teachers and might lose thirty or forty a year, they must have carefully detailed curriculum guides, and insist that the teacher make a detailed, individual student record.

7. I don't think the turnover overseas is caused completely by low salaries. The turnover is caused by the nature of the assignment. Low salaries would be a factor but a minor one. Most of the people don't go overseas to teach as a career, they go to travel.

8. Teachers who stay too long overseas run a real risk of losing contact with educational developments at home. Teachers in particular have to stay up to date and staying overseas for a length of time causes a problem in this area. Every teacher should get home at least every two years.

9. To the best of my knowledge, most of the people who remain with the overseas system do return to the United States for some training. I don't know to what extent. Most took advantage of the opportunity to come home. I would suggest more programs like the one the Air Force provided. A professor was brought from Los Angeles State College to conduct a workshop for a group of eighteen principals. Each received six graduate credits from Los Angeles State. In this manner the top school administrators can help in what is done. I know there exists the danger that some teachers will become expatriotes; I know a few that have.

10. Compared with the average teacher in the United States, the average overseas teacher is a little younger, at least as well trained, and has only a slight interest in job tenure. A good many have less interest in salary than in other rewards. However, everyone is interested in salary. Here at home we are very careful to keep our salaries up with the neighboring communities. A $200 salary differential will make a difference in our recruiting. The teachers will go to the community that pays a little better. The factor of salary is not as great as some would like to make it. Overseas school people have no problem with recruiting. They can offer a person who otherwise cannot afford it an opportunity to live and work in a foreign country.

11. From my personal knowledge, the people who are complaining most about salary have among their numbers some of the expatriates. I heard very few individual complaints about salaries.

12. The overseas systems and the state systems compare very well. Teacher-pupil ratio is about the

same, and the accreditation factor is about the same. When we get people overseas who come from wealthy school-minded communities, they are a little bit upset at the overseas schools. On the other hand, I have had parents leave the overseas schools, go to stations in the states, and write me and tell me how much better the overseas schools are. In summary - they compare very well.

/s/ Joseph P. Devine

WITH THE UNITED STATES AIR FORCE AT.)
LAURENCE G. HANSCOM FIELD, BEFORD,) SS.
MASSACHUSETTS)

Before me, the undersigned officer, on this day personally appeared Joseph P. Devine, known to me to be the person whose name is subscribed to the foregoing instrument. I, the undersigned, do hereby certify that I am at the date of this acknowledgement on active duty as a commissioned officer of the rank of First Lieutenant in the United States Air Force, and that I am a duly certified Judge Advocate.

/s/ Elwood B. Hain, Jr., 1st Lt. USAF
Judge Advocate

[Exhibit E]

STATE OF INDIANA

COUNTY OF ALLEN SS.:

CITY OF FT WAYNE

AFFIDAVIT OF HARRIET OBERLIN

I, HARRIFT OBERLIN, being duly sworn, depose and say that:

1. I am presently serving as Assistant Personnel Director for the Ft. Wayne Community Schools, Ft. Wayne, Indiana. In August 1963, I resigned my position as Di-

rector of Personnel, Air Force Dependents Schools, having completed ten years with the Dependents School Program. Six of those ten years were spent in the Far East where I served as principal teacher, assistant principal, principal, area superintendent, and was assigned the additional responsibility of recruiting teachers for four of those six years. In 1959, I requested and was granted transfer to the Air Force Schools of Europe, where I served as principal of an elementary school in England. I was there for the 1959-60 school year. In the Spring of 1960, I was offered a position as Director of Personnel for the Air Force Schools, USAFE, with Headquarters at Wiesbaden, Germany. I served in that capacity until my resignation in August 1963.

2. My experience prior to overseas service was as a teacher in the public schools of Indiana for nineteen years. I taught all eight grades at one time or another during that period. I received my Bachelors' Degree from Goshen College, and have done additional work at Ball State Teachers College, Muncie, Indiana, and Indiana University. I am presently enrolled as a graduate student at Ball State Teachers College, Muncie.

3. Comparing my experiences in civilian schools vs military schools, we naturally must recognize that the recruitment is limited to a much smaller area in civilian schools. Therefore, we are likely to recruit more native "hoosier" teachers in Indiana with training from our own Indiana schools. In the overseas schools we recruited from all states, all types of training positions — providing for the students, teachers of much better background, training, educational philosphy and outlook. These recruitments for our overseas schools certainly brought tremendous strengths into our classrooms. Furthermore, we were able to attract into the overseas schools, teachers with experience, which allowed for sabaticals, leaves of absence and so forth. This too provided for a wonderful source of enrichment for our school program.

4. The actual assignment of teachers in the overseas schools would not differ greatly from the assignment of teachers in civilian schools. Our efforts were always directed to assigning the best possible teacher available to serve in a specific classroom. There was undoubtedly a greater degree of reassignment, or, as we chose to call it, transfer of teachers from one school to another in the overseas organization due to the very nature of the program. Teachers were attracted to the overseas program for the opportunity of traveling abroad, to learn different languages and about cultures different from their own. This was accomplished as they were permitted to move from one country to another after having served satisfactorily for the one, two, or three years at their original place of assignment. This we felt was good. And although the continuity of a program in a given school might have been interrupted because of such a practice, it was our feeling that the school benefited as teachers were brought in who wanted to come and who were happy in their assignment. Morale, therefore, was high. The actual turnover of teachers within the organization as a whole, I do not believe was greater than in a comparable situation in any large civilian school organization. During my years of experience, I should estimate that about one-third of our total teacher group resigned each year. This included the teachers who had served satisfactorily for a period of time overseas and needed to return to their state-side assignment for retirement or tenure purposes. It also included that very strong group of teachers who had come to us on leave of absence or sabatical, and were required to return to their state-side positions. Another third of this mobile group would be the teachers requesting, and granted, an assignment from one school to another, or, more properly, from one country to another. Such reassignments were granted on the basis of satisfactory work performance at their original assignments; and these teachers were kept alive, alert, eager, and happy teachers by virtue of knowing they would be granted the privilege of such reassignment.

5. Further, it is my opinion that the fringe benefits accorded to the overseas teachers are multiple. I do not mean to say that they are more then they should be. But certainly it is about these fringe benefits that teachers inquire at the time of recruitment — not "How much are we going to make?"

6. It is certainly important that the morale of the teachers be kept at a high level, and this was recognized by the leaders of the overseas teachers' groups. Every effort was extended to provide the type of personnel services which would assure that this morale was kept at a high level. It has been my experience that, except in isolated cases, this was accomplished.

7. Recognition should be not only given to the qualifications of the teachers attracted to the overseas schools, but their dedication to duty and their willingness to adjust to the unexpected for the sake of serving the boys and girls in their classrooms and their country — often they gave service far beyond that actually required. For this we were all justly proud, and I feel that this type of service is worthy of any recognition which could be given. Noting these outstanding strengths in the ranks of teachers overseas, I would have to say that certainly they are entitled and should be recognized by a substantial increase in salary.

8. It was long ago recognized that there is grave danger of teachers losing contact with current professional practices while in a career of overseas teaching. Much has already been done, and much still remains to be done, to provide for professional improvement either through extension classes, seminars, workshops taught by recognized educational leaders who are brought overseas to bring such service to the teachers during the summer, or some type of additional provision which would encourage and allow teachers to return to the states during the summer for professional training.

9. Due to the nature of civil service, requirements regulating age, training, and so forth, the average age of

the new teachers in the overseas schools would be older then that in a comparable state-side situation. Likewise since three years experience is required before they may apply, the experience factor would be greater. I should judge, however, that the total average-age level of teachers overseas would be considerably lower than that of the state-side teacher.

10. Since such an overseas assignment is not generally considered to be a career appointment, I find it difficult to compare the curriculum of the overseas schools with that of state-side schools because they are necessarily different. There are some areas such as physical education which can not be developed to the extent that we would find in the average state-side school where high schools within a few miles of each other or even a few blocks can compete with each other in all types of athletics. Due to the distances between our schools overseas, such activities are limited to contest within the schools themself. I certainly feel that this weakness, if it is a weakness, is more then balanced by the opportunity of the pupils in the overseas schools to strengthen their social studies area. The pupils not only have the privilege of learning the language of a country in which they live, being taught by capable teachers, but can practice it with their neighbors and their friends. They learn first-hand how people live in the country of their parents' assignment. Such an experience can not be measured in terms of dollars and cents. There is no way in which such an experience could be added to any state-side school. I can think of no better way to prepare the American boys and girls to become worthy citizens in a world community of tomorrow then this opportunity of living and being educated in our overseas schools. I am proud to have been associated with the quality of teachers, administrators and students with whom I have worked during the ten years of my overseas assignment.

Harriet Oberlin

I, ROBERT E. SHARPE, the undersigned officer, do hereby certify that the foregoing instrument was subscribed and sworn to before me this 19th day of September 1964, by HARRIET OBERLIN, whose permanent home address is 1115 Edgewater Avenue, Ft. Wayne, Indiana, and who is known to me. And I do further certify that I am at the date of this affidavit a commissioned officer of the grade, branch of service, and organization stated below in the active service of the United States Armed Forces, that by statute no seal is required on this affidavit, and same is executed in my capacity as a judge advocate under authority granted to me by Art. 136, UCMJ; 10 U.S.C. 936.

Robert E. Sharpe
A03139257, 1STLT, USAF
Hq 305th Cmbt Spt Gp (SAC)
Bunker Hill AFB,
Peru, Indiana
264 Clyde Ave.
Jamestown, New York

[Exhibit F]

AFFIDAVIT OF MORRIS W. KANDLF

I, Morris W. Kandle, being duly sworn, depose and say that:

1. I am the Director of the Operations and Maintenance Division in the Office of the Deputy Assistant Secretary of Defense (Budget) and the responsibility for review of the budget program for the education of Department of Defense dependents overseas is assigned to my office.

2. To the best of my knowledge and belief, the attached information concerning the education of Department of Defense dependents overseas for Fiscal Year 1964 and

which is based on information submitted to this office by the military departments is correct.

Morris W. Kandle

County of Arlington)
)
) ss
State of Virginia)

Subscribed and sworn to before me, a Notary Public for the County of Arlington, State of Virginia, this 21st day of Oct , 1964.

R. E. Deane
Notary Public

My commission expires May 10, 1963.

DEPARTMENT OF DEFENSE
EDUCATION OF DEPENDENTS OVERSEAS
FISCAL YEAR 1964

	Obligations Incurred During FY 1964 Applicable to the Per Pupil Limitation	
	Amount	Percent
Panama Canal Zone schools	$3,328,735	7
Other tuition-fee schools	2,960,040	6
Compensation of Public Law 86-91 employees	32,363,490	68
Other costs of schools operated by the Department of Defense	9,326,444	19
Total obligations for Department of Defense and non-Department of Defense students	$47,978,709*	100
Total obligations for Department of Defense students	$46,057,857	

*Includes $1,920,852 reimbursement made to the Department of Defense for non-Department of Defense students. This reimbursement is applicable only to schools operated by the military departments.

[Filed August 19, 1964]

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COMES NOW the plaintiffs, by their attorneys, and move the Court for an order granting summary judgment in their favor on the ground that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law.

The detailed grounds on which this motion is based are contained in the supporting brief filed herewith.

Respectfully submitted,

WEAVER AND GLASSIE

By /s/ Henry B. Weaver, Jr.

/s/ William B. Beebe

/s/ Hershel Shanks

/s/ George A. Avery

Attorneys for Plaintiffs

1527 New Hampshire Avenue, N. W.
Washington 36, D. C.

Dated: August 19, 1964.

PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. Plaintiffs hereby adopt "Defendants' Statement of Material Facts As To Which There Is No Genuine Issue," filed in connection with defendants' motion for summary judgment.

2. In setting ODS teachers salaries for the 1960-61 school year, the Defense Department complied with the Teachers Pay Act as interpreted by plaintiffs on this motion. It has not done so since that time.

3. According to the Defense Department's estimate, compliance with the Teachers Pay Act as interpreted by plaintiffs on this motion would result in an average increase of approximately $500 per year for each ODS teacher. (This increase would not exceed the upper limit specified in the Teachers Pay Act, i.e., the basic rates of compensation paid to teachers in the District of Columbia.)

4. In each year since the passage of the Teachers Pay Act, the fund produced by the per pupil limitation has been larger than the total amount ODS teachers would have been paid if the Defense Department had complied with the Teachers Pay Act as interpreted by plaintiffs on this motion.

/s/ Hershel Shanks

Attorney for Plaintiffs

August 19, 1964.

Exhibit B

THE WHITE HOUSE
Washington

February 17, 1960

Dear Mr. Derrick:

Thank you for your recent letter in which you express your views on dependent schools in overseas areas. Since I am sure your conclusions would be of interest to the Department of Defense, the agency which operates the school system, I have therefore forwarded the Department a copy of your letter for review and appropriate further action.

As you probably know, the present pay system for overseas teachers was established by the Department of Defense pursuant to the authority contained in P.L. 86-91. I am advised that the objective in developing these pay scales was to provide rates of pay as comparable as possible to the average rates paid in the United States.

My letter of December 15, 1959, pointed out that consideration was being given to increasing the present limitation on average costs of dependents' schooling in foreign countries. The President has concluded in the 1961 budget a proposed amendment to the provision in

the Department of Defense Appropriation Act that limits the average cost per student. The amendment would increase the limitation from $265 to $280 per student and should permit the Defense Department to carry out more effectively the provisions of recent legislation (P.L. 86-91) concerning dependent schools. Further, in recognition of the need to improve physical facilities, proposed legislation authorizing military construction, which has been submitted to the Congress, includes $5,200,000 for overseas school construction projects.

Sincerely,

/s/ Gerald D. Morgan
The Deputy Assistant to the President

Mr. William M. Derrick
President, Overseas Teachers Association
Munich American Elementary School
A.P.O. 407
New York, New York

[Filed November 30, 1964]

ORDER

The defendants having moved to dismiss this action under Rule 12 (b) of the Federal Rules of Civil Procedure or, in the alternative, for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, and plaintiffs herein having cross-moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, and said motions having come on to be heard on November 12, 1964, and the Court being fully advised in the premises,

It is hereby ordered that defendants' motion for summary judgment and plaintiffs' cross-motion for summary judgment be and the same are hereby denied;

It is further ordered that defendants' motion to dismiss this action be granted, and the complaint herein be and the same is hereby dismissed.

/s/ Hart, J.
United States District Judge

Date: November 30, 1964

[Filed December 10, 1964]

NOTICE OF APPEAL

Notice is hereby given that Christine Mitchell, Cecil Driver, John Aliano, National Education Association of the United States (a corporation), and Overseas Education Association (an unincorporated association), being all the plaintiffs herein, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the Order entered on November 30, 1964, denying plaintiffs' motion for summary judgment and granting defendants' motion to dismiss.

WEAVER AND GLASSIE

By /s/ William B. Beebe
/s/ Hershel Shanks
/s/ George A. Avery

Attorneys for Plaintiffs

1527 New Hampshire Ave NW
Washington 36, D.C.

Dated: December 10, 1964

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,132

CHRISTINE MITCHELL, *et al.*,

Appellants

v.

ROBERT S. McNAMARA, *et al.*,

Appellees

On Appeal From the United States District Court for the District of Columbia

HENRY B. WEAVER, JR.
WILLIAM B. BEEBE
HERSHEL SHANKS
GEORGE A. AVERY

Attorneys for Appellant

Of Counsel:

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1527 New Hampshire Ave., N.W.
Washington, D.C. 20036

QUESTIONS PRESENTED

1. Whether the Teachers Pay Act creates a mandatory requirement that teachers in the Overseas Dependents School System be paid salaries generally equal to salaries for comparable positions in the United States.

2. Whether the per pupil limitation provision of the Defense Department Appropriations Acts excuses a failure to pay teachers in the Overseas Dependents School System salaries computed in accordance with the standard promulgated in the Teachers Pay Act.

3. Whether an action against Government officials which demonstrates that those officials, through actions beyond their statutory authority, have deprived appellants of rights granted by statute and have failed to take certain actions required of them by statute can be barred on the grounds of lack of standing to sue, sovereign immunity, or lack of power to issue mandamus.

INDEX

TABLE OF CITATIONS

Cases:

Cases—continued

Cases—continued

Cases—continued

Statutes:

Miscellaneous:

Miscellaneous—continued

*Cases or Authorities chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,132

CHRISTINE MITCHELL, CECIL DRIVER, JOHN ALIANO,
NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES,
a corporation, and
OVERSEAS EDUCATION ASSOCIATION,
an unincorporated association,

Appellants,

v.

ROBERT S. McNAMARA,
Secretary of Defense of the United States,
STEPHEN AILES,
Secretary of the Army,
PAUL H. NITZE,
Secretary of the Navy,
and
EUGENE M. ZUCKERT,
Secretary of the Air Force,

Appellees

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The complaint invoked the jurisdiction of the district court under 28 U.S.C. § 1331 (a) (1958 ed.), and 28 U.S.C. § 1361 (1958 ed. Supp. IV). It alleged that appellees (the Secretary of Defense and the three service secretaries) had refused to set salaries of teachers in the Overseas Dependent School System as required by the Teachers Pay Act (J.A. 5). An order in the nature of mandamus was sought requiring appellees to comply with the Teachers Pay Act (J.A. 8).

On November 30, 1964, an order was entered granting appellees' motion to dismiss and denying appellants' motion for summary judgment (J.A. 47). The notice of appeal was filed on December 10, 1964 (J.A. 48). The jurisdiction of this court rests on 28 U.S.C. § 1291.

STATEMENT OF THE CASE

1. The Proceedings Below

This is an appeal from an order of the district court dismissing appellants' complaint and denying appellants' motion for summary judgment. Appellants are three individuals, who are teachers in the Overseas Dependents School System, and two associations, the Overseas Education Association and the National Education Association. Appellants' complaint, filed March 2, 1964, sought an order from the district court requiring the appellees, *i.e.*, the Secretary of Defense and the three service secretaries, to fix overseas teachers' salaries in accordance with the provisions of the Defense Department Overseas Teachers Pay and Personnel Practices Act, 73 Stat. 213, 5 U.S.C. § 2351-58 (1958 ed. Supp. IV) (hereafter the Teachers Pay Act) and to make a periodic review of teachers' salaries to assure continuous compliance with the Act. On April 24, 1964, appellees moved to dismiss the complaint under Rule 12(b), F.R.Civ.P., on the ground the court lacked jurisdiction, or in the alternative, for summary judgment under Rule 56, F.R.Civ.P. On August 19, 1964, appellants filed their own motion for summary judgment. On November 30, 1964, an order was entered granting appellees' motion to dismiss and denying both motions for summary judgment.

2. The Facts

The Teachers Pay Act governs the pay of over 6,000 teachers in the Overseas Dependents School System [1]

[1] "ODS," as used herein, refers to the Overseas Dependents School System.

(J.A. 3). The System is responsible for the education of 155,000 students in 291 schools (J.A. 3) and provides primary and secondary education for the children of military and other government personnel assigned overseas (J.A. 3). The amount expended on the overseas school system in fiscal 1964 exceeded $67,000,000. Hearings before a Subcommittee of the House Committee on Appropriations, "Department of Defense Appropriations for 1965," 88th Cong. 2d Sess., pt. 2 at 639,646 (1964).

The Teachers Pay Act was passed in 1959 after extensive hearings on the problem of salaries of overseas teachers. The legislative history of the Act reveals that prior to 1959, the teachers in these overseas schools were paid in accordance with the provisions of the Classification Act and the Annual and Sick Leave Act of 1951. These acts of general applicability were, however, unsuited to the peculiarities of the teaching profession. For instance, because a teacher could be paid, under the Classification Act, only for days on which he actually worked, he received no compensation for Christmas recess and Easter recess unless sufficient leave time had been accrued to cover them. Moreover, under the Classification Act, it was impossible to take into account the many hours spent by the teachers outside the classroom in class preparation, meetings, extracurricular activities, and professional improvement. Because of these problems, the schools had serious morale problems and encountered difficulty in retaining teachers.[2] To solve these problems, legislation providing a special system of compensation and personnel administration for overseas teachers was introduced by the Administration in the Second Session of the 85th Congress.[3] Although hearings were held in

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[2] The problems described in this paragraph are recounted in H. Rept. 357, 86th Cong., 1st Sess. (1959) and in Hearings on H.R. 1871 and related bills before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service, 86th Cong., 1st Sess. (1959) pp. 10-27.

[3] H.R. 12225 and S. 3460, 85th Cong., 2d Sess.

that Session, the legislation never reached the floor.[4] In the 86th Congress, however, legislation on the same subject was again introduced and, after further hearings, the Teachers Pay Act was enacted. 73 Stat. 213, 5 U.S.C. §§ 2351-58 (1958 ed. Supp. IV).

Section 5(c) of the Teachers Pay Act provides:

> "The secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia." 5 U.S.C. § 2353(c).

In August, 1960, appellees promulgated regulations pursuant to this statute which added the administrative details and reflected a correct understanding of the statute. In applying the statutory standard, the regulations provided that the salaries of ODS teachers shall be equal to the average salary of teachers in urban school jurisdictions of 100,000 population and over[5] and

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[4] Hearings on H.R. 1871 and related bills before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service, 86th Cong., 1st Sess., 10 (1959).

[5] The pertinent language of the regulation is as follows:

"The compensation schedule will be established and adjusted 'in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia.'

"Comment: The above term will be applied as follows:

"(a) Comparison for the purpose of establishing and adjusting the compensation schedule will be made with rates of compensation in urban school jurisdictions of 100,000 popu-

(continued on following page)

that such salaries will be reviewed annually[6] (J.A.).

Initially, the Department of Defense complied with the statute and with its own regulations, setting a salary in 1960 which complied precisely with departmental regulations (J.A. 4). However, despite the clear statutory language and despite the understanding reflected in appellees' regulations, the salaries now paid ODS teachers are substantially lower than U.S. salaries for similar positions, the standard provided by statute and regulation (J.A. 5). Although the average U.S. salary has risen, there has been no annual review of ODS teachers' salaries (J.A. 5). ODS teachers have received only one raise, in the amount

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(*Footnote* 5 *continued from preceding page*)

lation and over. Data from as large a proportion of these school jurisdictions as possible will be utilized.

"(b) The beginning salary step [step(a)] of the compensation schedule will be related to the average (mean) of the entrance rates paid teachers holding a bachelor's degree, by establishing step (a) at this mean amount, rounded to the nearest five dollars.

"(c) The size of the step rate increases will be related to the average (mean) of step rate increases in effect by fixing the step rate increase at the mean amount paid teachers holding a bachelor's degree, rounded to the nearest five dollars." Section 4 of the Regulations, attached to Complaint as Exhibit A (J.A. 10-11).

[6] "1. The compensation schedule will be reviewed annually.

"Comment: It is recognized that many individual school districts review schedules each year and that a majority of the schedules are likely to be changed in any given year. It is recognized that to date the Classification Act and some other white collar pay plans have not been reviewed annually. It is customary, however, in government when wage schedules are administratively determined and related to prevailing rates, to provide an annual review. This procedure statement does not mean that the compensation schedule would be adjusted annually to reflect every increase, no matter how small, in the level of rates for teaching positions and this point is discussed later in this paper" (J.A. 9).

of $100 per year, and this was entirely unrelated to the scheme of the Teachers Pay Act and its implementing regulations (J.A. 5).

As a result of the policies pursued by defendants, the following salary comparisons may now be made. The ODS salary for entering teachers with a B.A. degree is $4535.[7] The comparable U.S. salaries computed in accordance with defendants' own regulations (which operate according to U.S. salaries in the previous school year) would be:

	1963–1964 School Year	1964–1965 School Year	1965–1966 School Year
U.S. Salary	$4855	$5095	$5270
Amount by which ODS salary is deficient	$320	$560	$735

The ODS salary for teachers with an M.A. plus 30 semester hours of further study is $4835.[8] The comparable U.S. salaries, computed in accordance with defendants' own regulations would be:

	1964–1965 School Year	1965–1966 School Year
U.S. Salary	$5570	$6330
Amount by which ODS salary is deficient	$735	$1495

ODS schools continue to have difficulty in retaining dedicated teachers because of appellees' failure to comply with the provisions of the Teachers Pay Act in setting ODS teachers' salaries (J.A. 6).

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[7] Complaint ¶ 14, (J.A. 5).

[8] Hearings Before A Subcommittee of the House Committee on Appropriations, "Department of Defense Appropriation for 1962" 87th Cong., 1st. Sess., 143-144 (1961). The figures shown there for base salary should be increased by $100 because a raise in that amount was given since these figures were published.

Appellees seek to excuse their failure to comply with the Teachers Pay Act on the basis of the so-called per pupil limitation of the Defense Department Appropriations Act. The per pupil limitation is not a matter of basic substantive legislation but is merely the means by which, since 1953, the total amount appropriated for the Overseas Dependents School System is fixed. The appropriations for school purposes are phrased as follows:

> "Appropriations for the Department of Defense for the current fiscal year shall be available, . . . for primary and secondary schooling for minor dependents of military and civilian personnel of the Department of Defense residing on military or naval installations or stationed in foreign countries . . . in amounts not exceeding an average of $265 per student, when the Secretary of the Department concerned finds that schools, if any, available in the locality, are unable to provide adequately for the education of such dependents." [9]

Since 1953, the amount of the per pupil limitation has risen, in a series of steps from $225 to its present level of $285, but the relevant language has not changed.[10] Appellees argue that because of the per pupil limitation they do not have sufficient funds and are relieved from the obligation of complying with the Teachers Pay Act. There is no dispute that ODS teachers' salaries are not computed in accordance with the standard contained in

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[9] The language quoted is from the appropriation for fiscal 1960 (73 Stat. 378-79; § 606 (1959)), the first fiscal year in which the Teachers Pay Act was applicable. The language has been substantially the same each year since 1953.

[10] The following are the citations for the per pupil limitation from 1953 to the present: 1953 - 66 Stat. 533, § 616; 1954 - 67 Stat. 351, § 614; 1955 - 68 Stat. 351, § 709; 1956 - 69 Stat. 315, § 609; 1957 - 70 Stat. 468, § 607; 1958 - 71 Stat. 323-24, § 607; 1959 - 72 Stat. 724, § 606. Amended by the Supplemental Appropriations Act of 1959, 72 Stat. 867; 1960 - 73 Stat. 378-379, § 606; 1961 - 74 Stat. 350, § 506; 1962 - 75 Stat. 375, § 606; 1963 - 76 Stat. 328, § 506; 1964 - 77 Stat. 264, § 506.

the Teachers Pay Act. There is also no dispute that if ODS teachers' salaries were computed in accordance with the Teachers Pay Act, the total amount required for such salaries would not exceed the total fund available for ODS schools under the per pupil limitation provision.

STATUTES AND REGULATIONS INVOLVED

The Defense Department Overseas Teachers Pay and Personnel Practices Act (the Teachers Pay Act) 73 Stat. 213, 5 U.S.C. §§ 2351-58 (1958 ed. Supp. IV) is set forth in full in the Appendix to this brief. The following excerpt from that Act is the subsection most pertinent to the problem involved in this litigation:

> "(c) Rates of basic compensation. The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia." 5 U.S.C. § 2353(c).

The per pupil limitation provision of the Department of Defense Appropriations Act, 1960, 73 Stat. 378-79; § 606 (1959), the first fiscal year after passage of the Teachers Pay Act, is as follows:

> "Appropriations for the Department of Defense for the current fiscal year shall be available, . . . for primary and secondary schooling for minor dependents of military and civilian personnel of the Department of Defense residing on military or naval installations or stationed in foreign countries . . . in amounts not exceeding an average of $265 per student, when the Secretary of the Department concerned finds that schools, if any, available in the locality,

> are unable to provide adequately for the education of such dependents . . . ." 73 Stat. 378-9; § 606 (1959).

Citations to the per pupil limitation in the Appropriations Acts for the years 1953 through 1964 are set forth in the Appendix to this brief.

The Department of Defense regulations entitled "Salary Determination Procedures," promulgated pursuant to the Teachers Pay Act, are set forth in the Appendix to this brief.

STATEMENT OF POINTS

1. The district court erred in failing to grant appellants' motion for summary judgment because, on the basis of undisputed facts, the following principles are established as a matter of law:

   (a) The Teachers Pay Act imposes a requirement on appellees that they pay salaries to teachers in the Overseas Dependents School System which are generally equal to U.S. salaries for comparable positions;

   (b) The per pupil limitation provision of the Defense Department Appropriations Act does not excuse appellees' failure to pay teachers in the Overseas Dependents School System salaries computed in accordance with the standard set forth in the Teachers Pay Act.

2. The district court erred in dismissing appellants' complaint since the jurisdictional defenses asserted by appellees on the basis of the principles relating to standing to sue, sovereign immunity and mandamus are without merit.

SUMMARY OF ARGUMENT

I

The Teachers Pay Act provides that appellees "shall" fix the salaries of teachers in the Overseas Dependents School System (ODS) "in relation to the rates of basic compensation for similar positions in the United States." 5 U.S.C. § 2353(c). The legislative history of this provision, the actual language used, and its administrative interpretation all demonstrate that the Act imposes upon appellees a mandatory obligation to fix salaries of ODS teachers so that such salaries are generally equal to salaries for comparable positions in the United States.

II

Because the so-called per pupil limitation is part of the Defense Department Appropriations Act, that limitation cannot be interpreted as suspending or repealing the provisions of the Teachers Pay Act unless there is a clear expression of Congressional intent that it do so. There is nothing in the language of the per pupil limitation or the Teachers Pay Act, nor in the legislative history of either, which expresses a Congressional intent that the per pupil limitation provision should relieve appellees from complying with the Teachers Pay Act. Moreover, there is nothing to prevent appellees from complying with both Acts.

III

The jurisdictional defenses asserted in the lower court are without merit: (1) Appellants have standing to sue since they complain of injuries to their statutorily granted rights through actions of appellees beyond their statutory powers. (2) Because the Teachers Pay Act imposes a mandatory requirement on appellees, the court may properly issue mandamus. (3) The sovereign immunity doctrine is not applicable in cases like the present where the court is asked to compel Government

officials to perform a ministerial duty as to the performance of which they have no discretion.

ARGUMENT

Appellants' right to the relief sought in this action rests on two propositions. First, the Teachers Pay Act imposes a mandatory requirement on appellees that they fix ODS teachers' salaries so that they are generally equal to salaries of teachers in the United States. Second, the per pupil limitation of the Appropriation Act does not excuse appellees' failure to comply with this mandatory requirement of the Teachers Pay Act. Since appellants are thus deprived of rights granted them by statute, and since appellees are exceeding their statutory authority, the court's jurisdiction to grant the relief sought in this proceeding is not barred by the doctrines of sovereign immunity, mandamus, or standing to sue.

I

Under the Teachers Pay Act, ODS Teachers' Salaries Must Be Generally Equal to Salaries of Teachers In the United States.

The Teachers Pay Act provides that the Secretaries of the various services "shall" fix the salaries of ODS teachers "in relation to the rates of basic compensation for similar positions in the United States." 5 U.S.C. § 2353(c). Under the Act, this language is to be implemented by regulations promulgated by the Secretary of Defense, which set forth the means of determining the actual amounts to be paid ODS teachers.[11] 5 U.S.C.

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[11] The Secretary of Defense, appellee, is directed by Section 4 of the Teachers Pay Act, 5 U.S.C. § 2352 (a), to promulgate regulations governing the fixing of the actual rates of compensation to be paid in accordance with the Act. Section 5(d) of the Act authorizes the various service secretaries to promulgate whatever regulations they deem necessary to carry out their functions under the Act. 5 U.S.C. § 2353. The

(continued on following page)

§ 2352(a)(2). The first point at issue, therefore, is the meaning of the requirement that ODS teachers' salaries "shall" be fixed "in relation to" salaries for "similar positions" in the United States.

In fact, there is little dispute between the parties that the provision in question means that salaries of ODS teachers shall be generally equal to salaries of teachers in the United States. Appellants, of course, so contend in their complaint. (Complaint, ¶ 10, J.A. 4). Their position is supported by the legislative history of the provision, by the plain meaning of the language in its context, by the stated positions of Government officials concerning the provision, and by the very regulations promulgated by appellees to implement the provision.

A. Legislative History

The legislative history of the Act makes it clear that Congress intended to establish the requirement that ODS teachers' salaries generally equal salaries for similar positions in the United States. Congressman Broyhill, the floor manager of the bill in the House, stated:

> "The intent of the legislation is to make the salaries and positions of overseas school teachers in line and competitive with those in the continental limits of the United States." 105 Cong. Rec. 9460 (1959)

Other Congressmen expressed the same thought. Congressman Foley pointed out that the bill grew out of a four-year study by a Civil Service subcommittee which recommended, among other things, that Congress

> "place the compensation and employment conditions of teachers in Government schools

(*Footnote* 11 *continued from preceding page*)

regulations of the service secretaries and the fixing of salary scales must, of course, be within the framework established by the regulations of the Secretary of Defense.

> overseas on a par with those prevailing in school systems in the United States." 105 Cong. Rec. 12711 (1959).

In hearing on the bill, Congressman Porter said:

> "Our overseas school teachers program will be placed on a par with school programs generally in the United States." Hearings on H.R. 1871 . . . before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service, 86th Cong., 1st. Sess., p. 7 (1959).

Administration officials who testified before Congress prior to passage of the Act expressed a similar understanding of its provisions. For instance, the Deputy Assistant Secretary of Defense for Manpower, Personnel and Reserve stated that enactment of the proposed legislation "would place the school teacher personnel program of the Department of Defense on a par with that found in school jurisdictions inside the Continental United States." *Id* at 12-13. There can be no question, therefore, of Congress' intent to require that ODS teacher salaries be generally equal to those of teachers in the United States.

B. The Statutory Language

Moreover, Congress expressed that intent in clearly mandatory terms. The language of the statute states:

> "The Secretary of each military department *shall* fix the rates of basic compensation . . . in relation to the rates of basic compensation for similar positions in the United States . . ." 5 U.S.C. § 2353(c) [Emphasis supplied]

While use of the word "shall" is not always dispositive of the question whether a statutory direction is mandatory or discretionary, it is invariably a strong indication that a mandatory direction is intended.

This court has considered the question in *Ballou v. Kemp*, 68 App. D.C. 7, 92 F.2d 556 (1937). In that case, the court had before it a statute which provided:

> "All pupils whose parents are employed officially or otherwise in the District of Columbia shall be admitted and taught free of charge in the schools of said District." 68 App. D.C. at 8, 92 F.2d at 557.

The Superintendent of Schools refused admission to plaintiff on the ground that the District schools were overly congested and that Congress had failed to appropriate funds to relieve the congestion. The court ordered the Superintendent to admit the plaintiff to the District schools, ruling that the word "shall" made the statute in question mandatory. The court quoted with approval the following language from Lewis' "Sutherland Statutory Construction," 1155 (2d ed. 1904):

> "The word 'shall' in its ordinary sense is imperative. When the word 'shall' is used in a statute, and a right or benefit to any one depends upon giving it an imperative construction, then that word is to be regarded as peremptory." 68 App. D.C. at 9-10, 92 F.2d at 558-59.

The court in the *Ballou* case noted that Congress used the permissive "may" in another section of the statute, and said:

> ". . . It can hardly be thought accidental that Congress used mandatory language in one part of the chapter and permissive in another. Such use of words is significant of purposeful selection." 68 App. D.C. at 11, 92 F.2d at 560.

It is highly significant in the present case, therefore, that in the very subsection of the statute which follows the mandatory language here in question, Congress said:

> "(d) The Secretary of each military department *may* prescribe and issue such regulations as he deems appropriate to carry out his functions under this chapter." [12] [Emphasis supplied] 5 U.S.C. § 2353(d)

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[12] The military department Secretaries obviously have no authority to avoid the governing regulations of the Secretary of Defense in making pay scale determinations. See p. 11, footnote 11.

The juxtaposition of "shall" and "may" in consecutive subsections of a statute makes it clear that the mandatory "shall" was deliberately chosen by Congress and reflects its intent that the appellees be required to use the statutory standard in fixing ODS teachers' salaries.

The *Ballou* case is not alone in its construction of the word "shall." In *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935), the Court said, ". . . [shall] is the language of command, a test significant though not controlling." The Court went on to find the statute in question there mandatory, because to hold otherwise

> ". . . would result in serious impairment of the public or the private interest that they were intended to protect." 295 U.S. at 494.

If the Teachers Pay Act were held to be discretionary only, it would, in fact, impair the private interests which that Act was intended to protect and nullify the purpose of the Act. Hence, the language quoted is directly applicable to this proceeding. [13]

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[13] There are numerous other federal cases — and innumerable state cases — in which a statute containing the provision "shall" has been interpreted as mandatory, in part, at least, because of the use of this ordinarily mandatory word. See *Richbourg Motor Co. v. United States*, 281 U.S. 528 (1930); *Lyon v. Alley*, 130 U.S. 177 (1889); *Merriwether v. Judge of Muhlenburg County Court*, 120 U.S. 354 (1887); *Port Gardner Investment Co. v. United States*, 272 U.S. 564 (1926); *French v. Edwards*, 13 Wall. (80 U.S.) 506 (1872); *Triangle Candy Co. v. United States*, 144 F.2d 195 (9th Cir. 1944); *Farmers' Loan & Trust Co. v. Northern Pacific Railroad Company*, 68 Fed. 36 (C.C.E.D. Wis. 1895); and *Ashley v. City of Anchorage*, 95 F.Supp. 189 (D. Alaska 1951).

Moreover, the Supreme Court has recognized that, ". . .[I]n general, a statute, even though not in express terms mandatory, is treated as being so if its literal observance might afford substantial protection to the party complaining . . ." *Erhardt v. Schroeder*, 155 U.S. 124, 129 (1894). See also *United States ex rel Siegel v. Thoman*, 156 U.S. 353 (1895); *Mason v. Fearson*, 9 How. (50 U.S.) 248 (1850); *Washington v. Pratt*, 8 Wheat. (21 U.S.) 681 (1923); *Supervisors v. United States*, 4 Wall. (71 U.S.) 435 (1866).

There are other indications in the language of the Teachers Pay Act that Congress intended application of the standard set forth therein to be mandatory. In the Act, Congress directed the Secretary of Defense to promulgate regulations implementing the Act. 5 U.S.C. § 2352(a). That Section lists a number of subjects which the regulations must govern, one of which is the following:

> "The fixing of the rates of basic compensation for teaching positions in relation to the rates of basic compensation for similar positions in the United States." 5 U.S.C. § 2352(a)(2)

This provision would have provided ample authority for the appellees to fix ODS teachers' salaries if Congress had intended that application of the standard contained in the Act be discretionary with appellees. However, Congress did not stop with the provision quoted above. It went on to include a specific direction, in mandatory terms, that ODS teachers "**shall**" be paid salaries fixed in relation to, *i.e.*, generally equal to, salaries of U.S. teachers. Unless this language is read as giving a mandatory direction that the statutory standard be applied in fixing ODS teachers' salaries, it must be regarded as mere surplusage. It is an elementary principle of statutory construction that a statute will not be interpreted so as to make a provision thereof unnecessary or meaningless.

In the District Court appellees argued that, despite the language in the statute, it imposes no mandatory obligation upon them. They base this claim on the statutory phrase "in relation to" which, say appellees, means that U.S. salaries are only one factor to be taken into account in fixing ODS salaries. This reading of the phrase "in relation to" finds no support in the legislative history which shows, instead, that Congress intended to require that ODS salaries be generally equal to U.S. salaries.

The appellees' interpretation also does violence to the language of the statute itself. Congress, if it wished, could easily have said that in fixing teachers' salaries consideration should be given to U.S. teachers' salaries. It could also have said that ODS salaries should, to the extent practical, strive toward equality with U.S. teachers' salaries, considering the funds available and other expenditures required by the system. Congress did not say this, however. Instead, the language used was that ODS salaries "shall" be fixed "in relation to" salaries for comparable positions in the United States, and on the floor of Congress it was made clear that this language was intended to express the requirement that ODS salaries be generally equal to U.S. salaries. Moreover, the phrase "in relation to" is the most practical way of expressing an intent that U.S. teachers' salaries control. Congress could not with precision have said "equal to," because there is no single standard of U.S. teachers' salaries; these salaries are set by a great number of local jurisdictions. Furthermore, determining which U.S. positions are "comparable" to positions in the ODS system requires a series of administrative decisions. By the phrase "in relation to," Congress made it perfectly clear that U.S. teachers' salaries were to be controlling. At the same time, this language left it to the Executive Branch to determine the actual level of U.S. salaries and the comparability of positions. Congress thereby avoided the difficulty arising from the indeterminate nature of U.S. teachers' salaries. It did not thereby give appellees the discretion to apply or not to apply the standard embodied in the Act.

Appellees seek to extend their admitted area of discretion beyond its legitimate bounds. Of necessity, the standard promulgated by the Teachers Pay Act gives the Executive Branch discretion to consider a variety of factors in determining the actual salary levels called for by that standard. However, the application of the standard in fixing salaries, once those factors are con-

sidered, is mandatory. Appellees are not free to set ODS teachers' salaries at whatever figure they wish. They are to consider the factors called for by the statutory language, make the requisite determinations, and fix teachers' salaries in accordance with the statutory standard.

C. The Administrative Interpretation

There was certainly no doubt in the minds of those charged with administering the Act, that, in accordance with its standard, they were required to fix salaries of ODS teachers so that they were generally equal to U.S. teachers' salaries.

This is shown, first, by the manner in which appellees initially implemented the Act. As previously noted, Congress left it to appellees to determine the precise dollar amounts of "basic rates of compensation for similar positions in the United States" in relation to which ODS teachers' salaries were to be fixed. Appellees met this obligation by issuing certain regulations (J.A. 9-12). Meeting their obligation to determine what their basic rates of compensation for "similar positions" in the U.S., appellees determined that salaries in urban school jurisdictions of 100,000 population and over should control. The regulations provided that data concerning salaries should be collected, that an average should be computed, and that salaries of ODS teachers should be set at the resulting figure. Regulations, ¶ 4 (J.A. 10-11). It was in this manner that the appellees established the salary scale of ODS teachers in 1960 (J.A. 4-5). Thus, appellees clearly recognized at the outset of their administration of the Teachers Pay Act that the language of the Act required ODS teachers to be paid salaries generally equal to those of U.S. teachers in similar positions.

Later, in reporting to Congress on the fiscal needs of the Defense Department after passage of the Teachers Pay Act, the Department spoke of the Act in the following terms:

> "Public Law 86-91 [the Teachers Pay Act] *requires* that the Secretaries of the military departments establish the salaries for teachers 'in relation to rates for similar positions in the United States.' The salary schedule for these positions adopted in January, 1960, is now being reviewed to determine its adequacy on the basis of latest available data on salaries of teachers in the United States. Because of general increases in such salaries in the United States some upward adjustment in the salary schedule of the military departments may be *required.*" [Emphasis supplied.] Hearings before a Subcommittee of the House Committee on Appropriations, "Department of Defense Appropriations for 1961," 86th Congress, 2d Sess., pt. 7 at 17 (1960).

President Eisenhower's own Deputy Assistant stated in a letter to the appellant, Overseas Education Association, dated February 29, 1960:

> "I am advised that the objective in developing these pay scales [under the Teachers Pay Act] was to provide rates of pay as comparable as possible to the average rates paid in the United States." (J.A. 46-47).

In 1961, the Deputy Secretary of Defense informed Congress that a survey of then current salaries in the United States revealed that ODS teachers should be given a $200 annual raise "to carry out the intent of this law [The Teachers Pay Act]." Hearings on H.R. 7851 before a Subcommittee of the Senate Committee on Appropriations, 87th Cong., 1st Sess., p. 1143 (1961).[14]

The administrative interpretation of the Teachers Pay Act expressed in the regulations and statements just discussed should have "peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion." *Norwegian Nitrogen Products*

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[14] See also Hearings before a Subcommittee of the House Committee on Appropriations "Defense Department Appropriations for 1962," 87th Cong., 1st Sess., pt. 2 at p. 226 (1961).

Co. v. United States, 288 U.S. 294, 315 (1933). See also *United States v. Atlantic Refining Co.*, 360 U.S. 19, 24 (1959); *United States v. Zucca*, 351 U.S. 91, 96 (1956); *Mintz v. Baldwin*, 289 U.S. 346, 351 (1933); *Fawcus Machine Co. v. United States*, 282 U.S. 375, 378 (1931); *Heath v. Wallace*, 138 U.S. 573, 582 (1891); *Hastings & D. R. Co. v. Whitney*, 132 U.S. 357, 366 (1889); *United States v. Johnston*, 124 U.S. 236, 253 (1888) and cases there cited.

When this administrative interpretation is considered along with the language of the Teachers Pay Act and its legislative history, it must be concluded that appellees are required to fix ODS teachers' salaries so that such salaries are generally equal to the salaries of U.S. teachers.[15]

II.

The Per Pupil Limitation Does Not Excuse Appellees' Failure To Comply With the Teachers Pay Act

Although the Teachers Pay Act imposes a mandatory requirement on appellees that ODS teachers' salaries be generally equal to salaries of U.S. teachers, ODS teachers' salaries today are substantially lower on the average than the comparable U.S. salaries. Although U.S. teachers' salaries have increased steadily and significantly over the last four years, ODS teachers have been given only one salary increase in that period, and that only in the amount of $100 per year.

The discrepancy between U.S. and ODS salaries is now substantial and will grow worse. Comparisons at various salary levels may be made. Taking the starting salary level for teachers holding a B.A. degree

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[15] Even in their own statement of undisputed material fact, appellees admitted that the Teachers Pay Act "*requires* that their [ODS classroom teachers] compensation be fixed 'in relation to the rates of basic compensation for similar positions in the United States.'" (J.A.).

only, the present ODS salary is $4535. The comparable U.S. salary, computed in accordance with appellees' own regulations, would be $4855 for the 1963-1964 school year; $5095 for the 1964-1965 school year and $5270 for the 1965-1966 school year. To bring these ODS salaries up to the level of comparable U.S. salaries would have required a 7% increase in 1963-1964; over a 12% increase for 1964-1965; and over a 16% increase for 1965-1966.

Taking the starting salary for teachers with an M.A. degree plus 30 semester hours of further study, the present ODS figure is $4835. The comparable U.S. salary, according to appellees' own regulation procedures, for 1964-1965 is $5570 and for 1965-1966 would be $6330. Bringing these ODS salaries up to comparable U.S. levels would require over a 15% increase in the 1964-1965 school year and over a 30% increase for the 1965-1966 school year.

Moreover, during this period Government employees under the Classification Act, the inequities of which as applied to teachers gave rise to the Teachers Pay Act, have been given a series of raises which aggregate almost 20 per cent.[16] Indeed, it can safely be said that ODS teachers are the only persons in the employ of the Federal Government whose rates of compensation have not been properly adjusted in the past four years. Postal employees, classified employees, Foreign Service employees, Congressional employees, judges, cabinet officers and Congressmen have in that period all received significant increases. ODS teachers, however, who are in a field where salaries at the level paid in the United States in any event hardly compensate them adequately for the vitally important function they per-

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[16] Compare 72 Stat. 203 (1958), which sets forth the salaries in effect until July 1, 1960 with 76 Stat. 843 (1962) which sets forth the rates in effect today. The 1960 increase averaged 9%. H.Rept. 1636, 86th Cong., 2d Sess., p. 2. In 1962, a two step raise, one averaging 5.5% and the other 4.1% was authorized. S.Rept. 2120, 87th Cong., 2d Sess., p. 12.

form, have been denied even the adjustment called for to keep their salaries at least one year behind those in similar positions in the United States.

Appellees contend that the per pupil limitation contained in the Defense Department Appropriation Acts excuses their failure to comply with the Teachers Pay Act. The per pupil limitation is not substantive legislation but the provision by which the total amount available for the ODS school system budget is determined. The Defense Department's appropriation provides that the aggregate amount to be expended on ODS schools shall not exceed a designated dollar figure multiplied by the number of pupils in the ODS school system.[17] The amount for the current fiscal year is $285 per pupil. 77 Stat. 264. Appellees claim that they need not comply with the Teachers Pay Act unless Congress raises the per pupil limitation sufficiently to increase the overall budget of the ODS school system by the amount needed for the teachers' salary increase required to achieve compliance with the Teachers Pay Act. This contention simply cannot withstand examination.

Initially, defendants' argument raises the question whether a substantive legislation enacted by Congress is overriden by an appropriation act provision. Repeals by implication are not favored and an appropriation act provision should be so interpreted only if and when the intent of Congress to use it in such manner is clearly expressed. *United States v. Dickerson*, 310 U.S. 554

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[17] For the Court's convenience, the language of the per pupil limitation is reiterated here:

> "Appropriations for the Department of Defense for the current fiscal year shall be available . . . for primary and secondary schooling for minor dependents of military and civilian personnel of the Department of Defense residing on military or naval installations or stationed in foreign countries, . . . in amounts not exceeding an average of $265 per student, when the Secretary of the Department concerned finds that schools, if any, available in the locality, are unable to provide adequately for the education of such dependents. . . ." 73 Stat. 378-9; § 606 (1959).

(1940); *Loisel v. Mortimer*, 277 Fed. 882 (5th Cir. 1922); *United States v. Greathouse*, 166 U.S. 601, 605 (1897). See also *Minis v. United States*, 40 U.S. (15 Pet.) 423, 443 (1841).

The question of whether an appropriations act provision overrides a substantive provision of another act has been considered in a long line of cases involving the pay of Federal employees. Among the cases are the following: *United States v. Langston*, 118 U.S. 389 (1886); *Mathews v. United States*, 123 U.S. 182 (1887); *Wallace v. United States*, 133 U.S. 180 (1890); *Belknap v. United States*, 150 U.S. 588 (1893); *United States v. Vulte*, 233 U.S. 509 (1914). Among lower court cases are: *United States v. Swiggett*, 83 Fed. 97, 100 (9th Cir. 1897); *Archbald v. United States*, 218 Fed. 270 (M.D.Pa. 1914). These pay cases apply the general principle stated in the preceding paragraph, *i.e.*, they accept the proposition that the pay of Federal employees may be varied from the amount set forth in a general statutory provision by means of a limitation in appropriation acts, but the intent of Congress so to limit must be clearly expressed.

In the *Langston* case, *supra*, an act of Congress provided that the salary of the Consul-General in Haiti would be $7,500. After appropriating this amount each year for a number of years Congress started to appropriate $5,000 a year for this position. After some years of receiving $5,000 per year, the Consul-General sued in the Court of Claims for the difference between the $5,000 and $7,500 and was successful in collecting that amount. The Court said:

> "[I]t is not probable that Congress, knowing, as we must presume it did, that that officer had, in virtue of a statute — whose object was to fix his salary — received annually a salary of $7,500 from the date of the creation of his office, and after expressly declaring in the Act of 1878, 20 Stat. at L. 91, 98, that he should receive that salary from and after July 1, 1878, and again in 1879, that he should receive the same amount from and

> after July 1, 1879, should, at a subsequent date, make a permanent reduction of his salary without indicating its purpose to do so, either by express words of repeal or by such provisions as would compel the courts to say that harmony between the old and the new statute was impossible. While the case is not free from difficulty, the court is of opinion that, according to the settled rules of interpretation, a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly or by clear implication modified or repealed the previous law." 118 U.S. at 393-94.

The reluctance of the courts to interpret a general provision of an appropriation act provisions as limiting a specific provision regarding pay of a certain class of employees is demonstrated by *Gibney v. United States*, 114 Ct. Cl. 38 (1949). In that case a special provision controlling the overtime pay of immigration inspectors had been enacted. Subsequently, Congress enacted a general law controlling overtime pay of all Federal employees. This general act contained a provision that it did not apply to overtime pay of immigration inspectors. Thereafter, Congress, at the instance of Senator Ball, passed an amendment to the Justice Department Appropriation Act, which stated that none of the funds appropriated for the immigration service shall be used to pay overtime pay other than as provided in the general act regarding overtime pay for all Federal employees. Senator Ball made a statement on the floor of Congress which made it clear that he intended that immigration inspectors be paid in accordance with the general law regarding all Federal employees. Despite this clear statement, the Court of Claims held that immigration inspectors should continue to be paid in accordance with the special act regarding them. The court pointed out that the appropriations act provision stated that immigation inspectors should not be paid

other than as provided in the general act and that the general act itself contained an exception for immigration inspectors. The court's refusal to give effect to the Senator's plain intent indicates that the repeal of a special pay provision should not be found to exist except in very unusual circumstances.

In *Ballou v. Kemp*, 68 App. D.C. 7, 92 F.2d 556 (1937), discussed at p. 13, *supra*, this court considered an argument strikingly similar to the case under consideration here. In both cases, a Government official sought to evade a statutory direction on the ground that, as a result of Congress' alleged failure to appropriate the necessary funds, there were not sufficient funds available to carry out the terms of the statutory direction. In the *Ballou* case, this court refused to excuse the official's failure to comply with the statute. That ruling should be controlling here.

With regard to the issue in this case, there is no indication in the language of either the per pupil limitation of the Teachers Pay Act that the per pupil limitation affects the obligations imposed by the Teachers Pay Act. This fact is all the more significant because the per pupil limitation had been in existence for several years when the Teachers Pay Act was passed. If the limitation had been intended to control, there would have been some indication of that fact in the language of one act or the other. Yet Congress enacted the mandatory language of the Teachers Pay Act without any reference to the limitation provision and the language used in the limitation remained essentially unchanged.

In the absence of statutory language supporting their position, appellees must rely on legislative history. In doing so, however, appellees face a fundamental problem. Although legislative history can be of aid in interpreting a statute whose meaning is not clear, legislative history has no significance if the statutory language does not express the meaning urged on the basis of that history. *United States v. Missouri Pacific RR Co.*, 278 U.S. 269 (1929), and cases cited therein. Here there is noth-

ing in the language of the Teachers Pay Act or the per pupil limitation which indicates that compliance with the Teachers Pay Act is discretionary, or contingent upon the per pupil limitation provision. Thus, even if the legislative history gave some support to appellees' present claim that the legislation is not mandatory, the absence of statutory language supporting that claim is fatal to appellees' position. In fact, however, the legislative history itself is of no help to appellees.

In the lower court, appellees pointed to the following statement in the most recent Senate report[18] on the per pupil limitation:

> "The Committee also believes that the present funding is sufficient to provide adequately for teachers' salaries, particularly in view of the fact that the Department has no difficulty whatever in recruiting qualified personnel." S. Rep. 1238, 88th Cong., 2d Sess., July 24, 1964, pp. 17-18.

However, this is not an expression that teachers' salaries themselves are adequate but that the funding is sufficient to provide for teachers' salaries. It may be read as a statement of belief by the Committee that appellees can meet their obligations with regard to teachers' salaries within the existing budgeted amount but it gives no support to the claim that they can ignore the requirements of the Teachers Pay Act.

When the most recent House report is considered, it is clear that Congress left the per pupil limitation unchanged because it felt appellees could meet their obligations within the existing amount. In that report, the House Appropriations Committee, in recommending that the per pupil limitations be retained at its present level, indicated clearly that the Committee felt that the appellees tended to overestimate their requirements and could meet their obligations within the existing budgetary framework. The report said:

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[18] This report was made on July 24, 1964, months after this case was filed.

> "In the opinion of the Committee therefore, with various adjustments that can be made by those responsible for administering the program, fund availability based on a $285 per pupil limitation will be sufficient to meet all reasonable budgetary requirements. *This also takes into consideration the tendency on the part of the Services to over-estimate the pupil workload for the budget year.*" H. Rep. 1329, 88th Cong., 2d Sess., pp. 27-28, April 17, 1964. [Emphasis supplied.]

Appellees also rely on the claim that they have repeatedly informed Congress of their position that they cannot pay the salaries called for by the Teachers Pay Act unless Congress raises the per pupil limitation, but that Congress has not raised the limitation. This claim has no more substance than would a claim by a cabinet officer that he cannot pay the personnel in his Department the amount called for by the Classification Act because Congress had cut his general appropriation below the amount requested.[19] It is the obligation of the Administration to expend funds appropriated for it in accordance with statutory requirements while remaining within the overall amount appropriated. Appellees are not doing so with respect to ODS teachers' salaries.

Finally, appellees relied in the court below on those portions of their own regulations which indicated that ODS teacher salary levels must be dependent upon the per pupil limitation. See Regulation 5 (J.A. 11-12). However, the question presented here is whether Congress intended that the per pupil limitation provision in the Defense Department Appropriations Acts overrides the mandatory requirement of the Teachers Pay Act. If, as appellants have demonstrated, the Teachers Pay Act imposes a mandatory requirement on appellees, they cannot escape that requirement on the basis of their

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[19] Many employees in ODS schools are paid under the Classification Act; *e.g.*, principals and their secretarial staffs, but appellees have never claimed they can pay them less than the salary called for by their grades because of per pupil limitation.

own regulations. If, on the other hand, appellees had been correct in arguing that they need not comply with the Teachers Pay Act unless a change is made in the per pupil limitation, then their own regulation would add nothing to their authority. Hence, the provisions of the regulation have no bearing on the present controversy. It is axiomatic that regulations must be in furtherance of the legislative will as expressed in the enabling act, not in derogation thereof.

In essence, appellees' position comes down to the claim that appellants cannot prevail unless they can point out where the funds necessary for compliance with the Teachers Pay Act can be found. There is, of course, no such obligation on appellant or on the court. Subject to the applicable acts of Congress, appellees are free to administer the ODS school system in whatever way they see fit provided they comply with Congressional mandates. There are, of course, many variables affecting the way in which ODS school funds are expended and the Court need not determine for appellees which would be affected by the relief sought in this case.

It is worth noting, however, that it may well be possible to pay teachers' salaries in compliance with the Teachers Pay Act without significantly reducing the amount expended on other aspects of the ODS schools. Appellees have considerable latitude in determining what items are charged against the "fund" created by the per pupil limitation and what items are not so charged. [20] By making changes in bookkeeping practices,

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[20] The following table shows certain items charged to the fund and other items not so charged:

Expenses Charged To the Fund	Expenses Excluded From the Fund
1. Salaries of general administrative personnel who assist the superintendent, including salaries of secretarial and clerical assistants, subject to	1. Salaries of school bus drivers. 2. Salaries of school custodial personnel.

(continued on following page)

it might be possible to create sufficient amounts in the "fund" to pay teachers the salaries to which they are entitled without reducing other services.[21]

III

Judicial Relief Is Available to Appellants Because Appellees Have Deprived Them of Statutory Rights Through Actions in Excess of Appellees' Statutory Powers.

The foregoing sections have demonstrated that the Teachers Pay Act sets forth a standard by which to fix ODS teachers' salaries and makes application of that standard mandatory; that the obligations imposed by this substantive legislation cannot be avoided on the basis of provisions in an appropriations act unless Congress' intent so to do is clearly expressed; and that there is no such expression of intent in the language or legislative history of the Teachers Pay Act or the per pupil limitation. In light of these conclusions, it is clear

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(Footnote 20 continued from preceding page)

the Classification Act.

2. Salaries of principals, although usually subject to the Classification Act.

3. Salaries of guidance counselors and supervisors.

4. Salaries of teachers, subject to the Teachers Pay Act.

5. Tuition costs of pupils enrolled in overseas private schools instead of ODS.

3. Salaries of civilian and military personnel assigned to command staffs whose duties are predominantly concerned with administering overseas dependents schools.

4. Utilities, devices and rental of school buildings.

Hearings before a Subcommittee of the House Committee on Appropriations, "Department of Defense Appropriations for 1965," 88th Cong., 2d Sess., pt. 2, at 647-650 (1964).

[21] As previously noted, the amount required to pay teachers' salaries computed in accordance with the Teachers Pay Act is less than the total amount of the "fund" created by the per pupil limitation.

that appellees' failure to comply with the Teachers Pay Act has deprived appellants of rights granted them by statute and that this deprivation of rights arises from actions by appellees in excess of their statutory powers.

These conclusions on the merits of the controversy constitute an effective bar to the jurisdictional defenses successfully asserted by the appellees in the lower court. Appellees' motion to dismiss, which was granted by the lower court, asserted that appellants lacked standing to sue, that the suit was barred by the sovereign immunity doctrine, and that mandamus could not be granted because it would interfere with discretionary authority of the Executive branch. The District Court did not indicate on what basis it granted appellees' motion to dismiss (J.A. 47-48). The principles controlling each of these defenses make them inapplicable to appellants' claim.

A. Standing To Sue

Claims by Government officials that judicial relief is unavailable to persons injured by acts of such officials in excess of their statutory authority are not viewed with favor by the courts. The Supreme Court stated the rule generally applicable in the following terms in *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958):

> "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers. *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108; *Philadelphia Co. v. Stimson*, 223 U.S. 605, 621-22; *Stark v. Wickard*, 321 U.S. 288, 310. The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us, judicial relief from this illegality would be avail-

able. Moreover, the claims presented in these cases may be entertained by the District Court because petitioners have alleged judicially cognizable injuries, *Cf. Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 159, 160." 355 U.S. at 581-2.

The Court's ruling in *Harmon v. Brucker* is especially pertinent since the injury complained of in the present case affects appellants more directly than the injury complained of in the *Harmon* case affected petitioner there. In *Harmon*, the petitioner obtained judicial review of a "General" discharge given him by the Army. This discharge was not "dishonorable" and had no direct legal effect on petitioner's rights. In the present case, however, there is a direct economic injury to appellants resulting from appellees' actions. The ruling in the *Harmon* case, therefore, applies with special force here.

Any doubt on the subject is put to rest by consideration of the ruling by this court and by the District Court for the District of Columbia in *Federal Trial Examiners Conference v. Ramspeck*,[22] a case closely parallel in its jurisdictional aspects to the case at bar. There the Government also asserted a lack of standing in an attempt to block a claim that Federal trial examiners had been deprived of rights granted them by the Administrative Procedure Act. This contention was rejected by both the District Court and the Court of Appeals.[23]

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[22] 104 F.Supp. 734 (D.D.C. 1952), affirmed per curiam, 91 U.S. App. D.C. 164, 202 F.2d 312 (1952), reversed on other grounds, 345 U.S. 128 (1958).

[23] The Supreme Court reversed on the merits of the controversy. In so doing, it noted that it was not passing on the standing of the appellant association in that case. The Court said nothing of the standing of the individual appellants, but in view of the finding of standing by the lower courts, the fact that the Supreme Court reserved the standing question only as to the association and that the Court actually ruled on the merits of the controversy can only be regarded as a ruling that the individual appellants had standing.

The rule could hardly be otherwise. If appellants here lacked standing to sue, then all Government employees would be powerless to prevent arbitrary action by other Government officials with regard to their salaries or other rights granted them by law. Government employees have never been at the mercy of arbitrary action in such manner. See, *e.g.*, *Service v. Dulles*, 354 U.S. 363 (1957); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Roberts v. Vance*, (D.C. Cir. No. 17,801, decided June 18, 1964).

B. The Availability of Mandamus To Compel the Relief Sought

If, as demonstrated in Sections I and II of this brief, it is mandatory that appellees fix ODS teachers' salaries in accordance with the standard established by the Teachers Pay Act, then the relief sought by plaintiffs is properly subject to mandamus.

Appellees point to the many factors involved in application of the Teachers Pay Act which are left to their determination and argue that appellants seek the compulsion of a discretionary act. In so contending, appellees confuse the limits of their discretion. Congress, of necessity, left in appellees' hands many decisions concerning the mechanics of ODS teachers' pay. Appellees were to determine what were "similar positions" in the U.S. to ODS teaching positions. They were to determine the level of U.S. salaries for such positions. They were to determine the criteria for step raises in ODS teachers' salaries. There were many other factors which appellees were to determine. However, the language of the Act and its legislative history make it clear that at a certain point, their discretion ceased. When appellees had determined what U.S. salaries for similar positions were, they were required to pay ODS teachers that same salary. This application of the statutory standard in fixing ODS teacher salaries is a mandatory requirement as to which appellees have no discretion. As such, it is properly subject to mandamus.

Congress frequently leaves certain elements affecting a decision to the discretion of administrative officials and, as to other elements affecting that same decision, it gives specific and mandatory instructions. In such cases, a court will not intervene to control the exercise of the discretionary elements. But a court will order the administrator to follow Congress' specific mandatory directions. For example, in *Harmon v. Brucker*, 355 U.S. 579 (1958), the administrator was given broad authority to issue certificates of discharge to servicemen. It was clear that the ultimate determination as to whether a man received an honorable or less than honorable discharge required the exercise of broad discretion and judgment. But, as the court found, Congress had instructed that the final determination be made only on the basis of the records of military service and not on the basis of pre-induction activities. Despite the highly discretionary content in the final decision regarding the type of discharge to be given a serviceman, the court issued mandamus with respect to mandatory elements of the decision as directed by Congress.

This Court pursued the same reasoning in *Clackamas County, Ore. v. McKay*, 94 U.S. App. D.C. 108, 219 F.2d 479 (1954), dismissed as moot, 349 U.S. 909 (1955). There, the court analyzed the provisions of certain Congressional enactments and concluded that they "conferred upon the Secretary of the Interior many duties requiring the exercise of his discretion and judgment" (94 U.S. App. D.C. 116, 219 F.2d 487).

As to other duties under these statutes, "they contain certain mandatory directives to the Secretary, which do not involve any exercise of discretion or judgment on his part" (*Ibid.*). As to these mandatory aspects, the court directed the issuance of mandamus.

In the lower court, the question also was raised whether mandamus was available in view of the fact that some measure of statutory construction is needed in supporting plaintiffs' position. However, this court has

not previously been deterred from issuing a writ of mandamus by the need for construction of a statute. In *Clackamas County, Ore. v. McKay, supra*, the court itself was divided as to the meaning of the statute in question. The dissenter argued that because the meaning of the statute was debatable, mandamus was not proper. 219 F.2d at 497. The majority rejected this view and supported issuance of the writ, saying:

> ". . . Executive officers cannot under such circumstances create an area of doubt and dispute which will be outside the established power of the judiciary to compel obedience to a clear mandate of the Congress. They cannot by bootstraps manufactured by them lift themselves out of the jurisdiction of the courts." 219 F.2d at 495.

Similarly in *Udall v. Wisconsin, Colorado and Minnesota*, 113 U.S. App. D.C. 183, 306 F.2d 790 (1962), *cert. denied*, 371 U.S. 969 (1963), the court was divided on the meaning of the statute in question but did not abdicate its function by saying it had no jurisdiction to review the Secretary's interpretation of the statute in question. In that case, the court noted that the Supreme Court had rejected "the doctrine that statutory construction is an exercise of administrative judgment or discretion." 306 F.2d at 793, fn. 16.

The Supreme Court did reject that doctrine in *Roberts v. United States ex. rel. Valentine*, 176 U.S. 221, 231 (1900) where the court said:

> "Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which re-

> quires, in some degree, a construction of its language by the officer." 176 U.S. at 231.

See also *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306 (1930); *Lane v. Hoglund*, 244 U.S. 174 (1917); *McKay v. Wahlenmaier*, 96 U.S. App. D.C. 313, 226 F.2d 35 (1955).

There is no merit, therefore, in the appellees' reliance on the argument that appellants seek to compel discretionary acts not subject to mandamus. The court can and should examine the statutory language in question and if it concludes, as it must, that the appellees have failed to comply with the directions contained therein, it should issue an order requiring them to do so.

The ruling by the lower court that it lacked jurisdiction despite the fact that public officials had acted beyond their statutory powers cannot be upheld. As this court said in *West Coast Exploration Co. v. McKay*, 93 U.S. App. D.C. 307, 213 F.2d 582 (1954), *cert. denied*, 347 U.S. 989:

> "Such a denial of recourse to the courts would be abhorrent to the justice according to law contemplated by the Constitution. The due process clause of the Fifth Amendment endows the United States courts with power, even though there is no statutory provision for direct review of the action of a public officer, to protect against arbitrary action by such an officer." 213 F.2d at 596.

This court should reverse the lower court's determination that appellants have no legal redress for the wrongs done them.

C. The Doctrine of Sovereign Immunity

The discussion of the merits in Sections I and II of this brief has demonstrated that appellants in this action are seeking to compel the appellee Government officials to perform a ministerial duty as to the perform-

ance of which they have no discretion.[24] The Teachers Pay Act, say appellants, requires appellees to fix ODS teachers' salaries in accordance with the statutory standard, and appellees have failed to perform this mandatory function. These conclusions on the merits make it clear that the sovereign immunity defense is not available.

Many decisions of this court have held the immunity doctrine to be inapplicable where, as here, the Government official is ignoring a mandate of the sovereign. In the leading case on sovereign immunity in this Circuit, *Clackamas County, Ore. v. McKay*, 94 U.S. App. D.C. 108, 219 F.2d 479 (1954), the court said:

> "Since Marbury v. Madison the courts have followed its rule, compelling executive Government officials to comply with directives of the Congress where a specific directive imposed a ministerial duty devoid of the exercise of judgment or discretion." 219 F.2d at 489.

Similar rulings were made in *Udall v. Wisconsin, Colorado and Minnesota*, 113 U.S. App. D.C. 183, 306 F.2d 790 (1962) *cert. denied*, 371 U.S. 969 (1963) and *West Coast Exploration Co. v. McKay*, 93 U.S. App. D.C. 307, 213 F.2d 582 (1954).

In *Dugan v. Rank*, 372 U.S. 609 (1963), a recent Supreme Court case relied on by appellees in the lower court, the Court held that the sovereign immunity doctrine did not bar suit in cases involving action by officers beyond their statutory powers. 372 U.S. at 621-22. In so doing, the Court reaffirmed its holding in *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949) where the Court said:

> "'[T]he action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for

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[24] See p. 32, supra, where the limits of appellees' discretion are discussed.

> specific relief against the officer as an individual only *if it is not within the officer's statutory powers . . . .*" 337 U.S. at 701-702 [Emphasis supplied.]

Appellees claimed in the lower court that the sovereign immunity doctrine was applicable because the relief sought would affect property of the United States. In so arguing, appellees were relying on a footnote in *Larson v. Domestic and Foreign Commerce Corp., supra,* which appeared to indicate that sovereign immunity was applicable in such situations. This court considered the meaning of this footnote in the *Larson* case in its decision in the *Clackamas* case, *supra,* and concluded that the footnote in question refers only to situations in which sovereign action is required, not where the order sought would enforce the sovereign's directive. This is a sovereign direction as to what is to be done. When a court orders compliance with a Congressional directive, it is not **compelling** sovereign action but is **implementing** the will of the sovereign. Hence, the court reasoned, the *Larson* footnote does not mean that a suit must fail in every case in which a judgment for the plaintiff would involve the disposition of sovereign property. 219 F.2d at 493. To give it such an interpretation, the Court said, would mean that the Supreme Court had overruled an entire line of cases on compelling ministerial duties stemming from *Marbury v. Madison.* "We think it inconceivable that the Court would take such a step without mentioning the rule of those cases or the cases themselves, and particularly that it would take such sweeping action in a footnote to an opinion which did not involve the point." (94 U.S. App. D.C. at 122, 219 F.2d at 493.)

In the *Clackamas County, West Coast Exploration Co.,* and *Udall* cases, *supra,* this court rejected the same argument appellees make here. Each of those cases involved the disposition of government property, but the court rejected the defense of sovereign immunity. Appellees cannot seek shelter behind that doctrine here.

CONCLUSION

For the reasons stated, the decision of the court below should be reversed and appellants' motion for summary judgment should be granted.

Respectfully submitted,

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Dated: February 10, 1965

APPENDIX

APPENDIX

I. The Defense Department Overseas Teachers Pay and Personnel Practices Act (The "Teachers Pay Act"), 73 Stat. 213, 5 U.S.C. §§ 2351-58 (1958 ed. Supp. IV):

§ 2351. Definitions.

For the purposes of this chapter, the term —

(1) "teaching position" means those duties and responsibilities which —

(A) are performed on a school-year basis principally in a school operated by the Department of Defense in an overseas area for dependents of members of the Armed Forces and dependents of civilian employees of the Department of Defense, and

(B) involve —

(i) classroom or other instruction or the supervision or direction of classroom or other instruction; or

(ii) any activity (other than teaching) which requires academic credits in educational theory and practice equal to the academic credits in educational theory and practice required for a bachelor's degree in education from an accredited institution of higher education; or

(iii) any activity in or related to the field of education notwithstanding that academic credits in educational theory and practice are not a formal requirement for the conduct of such activity.

(2) "teacher" means an individual —

(A) who is a citizen of the United States,

(B) who is a civilian, and

(C) whose services are required on a school-year basis in a teaching position.

(3) "overseas area" means any area situated outside the United States.

(4) "United States", when used in a geographical sense, means the several States of the United States of America, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, the Canal Zone, and the possessions of the United States (excluding the Trust Territory of the Pacific Islands and Midway Islands).

§ 2352. Regulations of Secretary of Defense.

(a) Not later than the ninetieth day following July 17, 1959, the Secretary of Defense shall prescribe and issue regulations to carry out the purposes of this chapter. Such regulations shall govern —

(1) the establishment of teaching positions;

(2) the fixing of the rates of basic compensation for teaching positions in relation to the rates of basic compensation for similar positions in the United States;

(3) the entitlement of teachers to compensation;

(4) the payment of compensation to teachers;

(5) the appointment of teachers;

(6) the conditions of employment of teachers;

(7) the length of the school year or school years applicable to teaching positions;

(8) the leave system for teachers;

(9) quarters, allowances, and additional compensation for teachers; and

(10) such other matters as may be relevant and appropriate to the purposes of this chapter.

(b) The regulations prescribed and issued by the Secretary of Defense under subsection (a) of this section shall become effective on such date as the Secretary of Defense shall prescribe but not later than the ninetieth day following the date of issuance of such regulations.

§ 2353. Administration.

(a) Employment and salary practices.

The secretary of each military department in the Department of Defense shall conduct the employment and salary practices applicable to teachers and teaching positions in his military department in accordance with this chapter, other applicable law, and the regulations prescribed and issued by the Secretary of Defense under section 2352 of this title.

(b) Determination of exempt positions and individuals; establishment of annual salary rate.

Subject to section 1083 of this title, the secretary of each military department —

(1) shall determine the applicability of paragraph (33) of section 1082 of this title, to positions and individuals in his military department, and

(2) shall establish the appropriate annual salary rate in accordance with this chapter for each such position and individual to which such paragraph (33) is determined to be applicable.

(c) Rates of basic compensation.

The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia.

(d) Issuance of regulations by Secretaries of military departments.

The Secretary of each military department may prescribe and issue such regulations as he deems appropriate to carry out his functions under this chapter.

§ 2354. Leave.

(a) Entitlement; amount.

Subject to the regulations prescribed and issued by the Secretary of Defense under Section 2352 of this title, each teacher (other than an individual employed as a substitute teacher) shall be entitled to cumulative leave, with pay, which shall accrue at the rate of one day for each calendar month, or part thereof, of a school year, except that —

(1) if the school year includes more than eight months, any such teacher who shall have served for the entire school year shall be entitled to ten days of cumulative leave with pay, and

(2) not more than seventy-five days of leave may accumulate to the credit of a teacher at any one time under this subsection.

(b) Saturdays, Sundays, holidays, and nonwork days.

Saturdays, Sundays, regularly scheduled holidays, and other administratively authorized nonwork days shall not be considered to be days of leave for the purposes of subsection (a) of this section.

(c) Purposes for taking leave.

Subject to the regulations prescribed and issued by the Secretary of Defense, leave earned by any teacher under subsection (a) of this section may be used by such teacher —

(1) for maternity purposes,

(2) in the event of the illness of such teacher,

(3) in the event of illness, contagious disease, or death in the immediate family of such teacher, and

(4) in the event of any personal emergency.

If appropriate advance notice is given of the intended absence of a teacher, not to exceed three days of such leave may be granted for any purpose in each school year to such teacher.

(d) Credit for persons holding teaching positions and for employees transferred, promoted or reappointed.

Any individual —

(1) who is holding a position which is determined to be a teaching position, or

(2) who is an employee of the Federal Government or the municipal government of the District of Columbia who is transferred, promoted, or reappointed, without break in service, from a position under a different leave system to a teaching position, shall be credited, for the purposes of the leave system provided by this section, with the annual and sick leave to his credit immediately prior to the effective date of such determination, transfer, promotion, or reappointment. Sick leave so credited shall be included in the leave provided for in subsection (a) of this section. Annual leave so credited shall not be included in the leave provided for in such subsection but shall be used under regulations which shall be prescribed by the Secretary of the military department concerned.

(e) Excess of maximum amount of accumulated leave; reduction.

In any case in which the amount of sick leave, which is to the credit of any individual under a different leave system immediately prior to the date on which he becomes subject as a teacher to the leave system provided by this section and which is included in the leave provided for in subsection (a) of this section, is in ex-

cess of the maximum amount of accumulated leave allowable under subparagraph (2) of such subsection, such excess shall remain to the credit of such teacher until used, but the use during any leave year of an amount in excess of the aggregate amount which shall have accrued during such year shall reduce automatically the maximum allowable amount of accumulated leave at the beginning of the next leave year until such amount no longer exceeds the maximum amount allowable under subparagraph (2) of subsection (a) of this section.

(f) Liquidation of unused leave upon separation.

Any annual leave remaining upon his separation from the service, to the credit of an individual within the purview of this section shall be liquidated in accordance with section 61b of this title, except that leave earned or included under subsection (a) of this section shall not be liquidated.

(g) Transfer of leave credit for teachers transferred, promoted or reappointed to positions under different leave system.

In case of any teacher who is transferred, promoted, or reappointed, without break in service, to a position under a different leave system, the annual leave, and any other leave earned or credited under this section, which is to his credit immediately prior to such transfer, promotion, or reappointment, shall be transferred to his credit in the employing agency on an adjusted basis in accordance with regulations which shall be prescribed by the United States Civil Service Commission.

§ 2355. Quarters, quarters allowances, and storage.

(a) Entitlement.

Under regulations which shall be prescribed by or under authority of the President, each teacher (other than a teacher employed in a substitute capacity) shall

be entitled, in addition to basic compensation, to quarters, quarters allowance, and storage as provided by this section.

(b) Furnishing of living quarters or grant of allowance.

Each teacher (other than a teacher employed in a substitute capacity) shall be entitled, for each school year for which he performs services as a teacher, to quarters or a quarters allowance equal to those authorized by section 118a of this title.

(c) Recess periods.

Each teacher (other than a teacher employed in a substitute capacity) who is performing services as a teacher at the close of a school year and agrees in writing to serve as a teacher for the next school year may be authorized, for the recess period immediately preceding such next school year —

(1) quarters or a quarters allowance equal to those authorized by section 118a of this title, or

(2) in lieu of such quarters or quarters allowance, storage (including packing, drayage, unpacking, and transportation to and from storage) of his household effects and personal possessions.

(d) Failure to report for service; liability to United States.

If a teacher does not report for service at the beginning of the next school year, he shall, except for reasons beyond his control and acceptable to the Department of Defense, be obligated to the United States in an amount equal to any quarters allowance which he may have received under subsection (c) of this section or in an amount equal to the reasonable value of any quarters or storage which he may have received under such subsection, or both, as the case may be.

(e) Employment in other positions during recess periods.

Quarters, quarters allowance, and storage provided under this section shall be in lieu of any quarters, quarters allowance, and storage to which he otherwise might be entitled by reason of employment in another position during any recess period between two school years.

§ 2356. Cost-of-living allowances and post differential.

(a) Under regulations which shall be prescribed by or under authority of the President, each teacher (other than a teacher employed in a substitute capacity) shall be entitled, in addition to basic compensation, to —

(1) cost-of-living allowances equal to those authorized by section 1131(2) of Title 22, and

(2) additional compensation equal to that authorized under section 118h of this title.

(b) The cost-of-living allowances and additional compensation provided under subsection (a), of this section for any teacher shall be based on the teaching position in which he rendered services on a school-year basis, except that, if such teacher is employed in another position during any recess period between two school years, such allowances and compensation for such recess period shall be based on the position in which he is employed during such recess period.

§ 2357. Determination of per annum salary rates for certain positions.

For the purposes of the application of section 1132 (a) of this title to any individual holding a teaching position who comes within the purview of any provision of such section, the rates of pay established for such position shall be deemed to have been increased by 20 per centum to determine the per annum salary rate of such position.

§ 2358. Applicability of certain existing law.

(a) The Annual and Sick Leave Act of 1951, as amended, and the Federal Employees Pay Act of 1945, as amended, shall not apply to teachers and teaching positions.

(b) In the case of any teacher who —

(1) is performing services as a teacher at the close of a school year,

(2) agrees in writing to serve as a teacher for the next school year, and

(3) is employed in another position in the recess period immediately preceding such next school year, or, during such recess period, receives quarters, allowances, or additional compensation referred to in sections 2355 and 2356 of this title, or both, as the case may be,

section 62 of this title, relative to the holding of more than one office, section 6 of the Act of May 10, 1916, relative to double salaries, and any other law relating to the receipt of more than one salary or the holding of more than one office shall not apply to such teacher by reason of any such employment during a recess period or any such receipt of quarters, allowances, or additional compensation, or both, as the case may be.

(c) Notwithstanding any provision of law, employment of a teacher in the recess period between two school years in a position other than the teaching position in which he rendered service in the school year immediately preceding such recess period shall not be subject to the Federal Employees' Group Life Insurance Act of 1954 or to the Civil Service Retirement Act.

II. The Per Pupil Limitation in the Annual Defense Department Appropriation Acts.

Appropriations for the Department of Defense for the current fiscal year shall be available, . . . for primary and secondary schooling for minor dependents of military and civilian personnel of the Department of Defense residing on military or naval installations or stationed in foreign countries . . . in amounts not exceeding an average of $265 per student, when the Secretary of the Department concerned finds that schools, if any, available in the locality, are unable to provide adequately for the education of such dependents . . . . [73 Stat. 378-9; § 606 (1959)]

Citations to the Limitation in Appropriations Acts, 1953-1964

Fiscal Year

1953 - $225 (66 Stat. 533; § 616)
1954 - $225 (67 Stat. 351; § 614)
1955 - $235 (68 Stat. 351; § 709)
1956 - $240 (69 Stat. 315; § 609)
1957 - $245 (70 Stat. 468; § 607)
1958 - $245 (71 Stat. 323-24; § 607)
1959 - $245 (72 Stat. 724; § 606) Amended to $265 by the Supplemental Appropriations Act of 1959, 72 Stat. 867.
1960 - $265 (73 Stat. 378-79; § 606)
1961 - $275 (74 Stat. 350; § 506)
1962 - $275 (75 Stat. 375; § 606)
1963 - $280 (76 Stat. 328; § 506)
1964 - $285 (77 Stat. 264; § 506)

III. Department of Defense Regulations Entitled "Salary Determination Procedures."

U.S. Department of Defense
Washington 25, D. C.

DEPARTMENT OF DEFENSE
SALARY DETERMINATION PROCEDURES
OVERSEAS DEPENDENTS SCHOOL TEACHING
POSITIONS CLASS 1*

1. The compensation schedule will be reviewed annually.

COMMENT: It is recognized that many individual school districts review schedules each year and that a majority of the schedules are likely to be changed in any given year. It is recognized that to date the Classification Act and some other white collar pay plans have not been reviewed annually. It is customary, however, in government when wage schedules are administratively determined and related to prevailing rates, to provide an annual review. This procedure statement does not mean that the compensation schedule would be adjusted annually to reflect every increase, no matter how small, in the level of rates for teaching positions and this point is discussed later in this paper.

2. Review of the compensation schedule will be based on surveys of teaching position salaries conducted by the military departments, including the use of such authoritative salary data as may be available.

COMMENT: The military departments will conduct surveys of teachers' salaries, extra curricular pay benefits and certain school administrative type positions as are necessary but will make maximum use of available authoritative data. The National Education Association collects and publishes data on salaries paid

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* These procedures relate to teaching positions as defined in DOD Instruction 1400.13.

classroom teachers and school administrators in the United States. These publications are factual and can be used along with other appropriate data in determining overseas dependents school teachers' salaries.

3. Salary data for teaching positions will be obtained and analyzed on a timely basis and the results will be utilized to seek adjustment in the per pupil limitation sufficient to permit warranted increases in the compensation schedule.

COMMENT: It must be recognized that the per pupil limitation established by the Congress determines the maximum amount which can be spent in the operations of the dependents schools. Since salaries comprise a substantial part of operating costs it is expected that in the future the per pupil limitation will have to be increased before salaries can be adjusted. The most appropriate time to start administrative action to obtain an increase in the per pupil limitation is in August of each year, the time at which final budget preparation for the following fiscal year commences. This means that determination as to warranted salary adjustments must be made in July of each year.
NOTE: By Bureau of the Budget regulations the Department of Defense is not permitted to budget for anticipated increases in wages or salaries based on prevailing rates outside of the Federal Government. Only wage or salary schedules based on wages and salaries actually being paid can be considered.

4. The compensation schedule will be established and adjusted "in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia."

COMMENT 1: The above term will be applied as follows:

(a) Comparison for the purpose of establishing and adjusting the compensation schedule will be made with rates of compensation in urban school jurisdictions of 100,000 population and over. Data from as large a proportion of these school jurisdictions as possible will be utilized.

(b) The beginning salary step [step (a)] of the compensation schedule will be related to the average (mean) of the entrance rates paid teachers holding a bachelor's degree, by establishing step (a) at this mean amount, rounded to the nearest five dollars.

(c) The size of the step rate increases will be related to the average (mean) of step rate increases in effect by fixing the step rate increase at the mean amount paid teachers holding a bachelor's degree, rounded to the nearest five dollars.

COMMENT 2: If teacher salaries continue to rise, as expected, then averages taken each year as provided above will show some upward change. This will be true even if only one of a few school districts grant increases. It is not administratively feasible to reflect very small increases. A reasonable figure, therefore, must be established as the minimum adjustment which will be made in any one year in the entrance rate and yearly increments, and only amounts which meet or exceed these minimums will be adopted. These minimum adjustment figures will be a hundred dollars at the first step and ten dollars for yearly increments.

COMMENT 3: A point may be reached where consideration will have to be given to a limitation on adjustments where such adjustments would result in those employees paid from the compensation schedule receiving a higher salary than their Classification Act supervisors.

5. When the per pupil limitation is known, final determination as to an appropriate adjustment will be made. Adjustments in the compensation schedule will be made coincident with the beginning of the school year.

COMMENT 1: It is planned that if the per pupil limitation is increased sufficiently to effect adjustments as provided above, such adjustments will be ordered into effect. There may be times, however, where the per pupil limitation will permit only part of the adjustment being made effective. Final determination of the adjustment, therefore, should await decision on the per pupil limitation.

COMMENT 2: From a management standpoint, the start of the school year seems to be the most appropriate time to place adjustments in effect. In passing, however, it should be noted that when adjustments are effected, new teachers will go on duty at a higher salary than had been indicated at the time they were recruited. It is understood that this is no problem, for at the time of recruitment, prospects can be told that the starting salary will not be less than last year's figures and (if adjustments have been proposed) it may be more. Recruiters, of course, can offer a certain figure during those years when adjustments are not being proposed.

BRIEF FOR THE APPELLEES

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19132

CHRISTINE MITCHELL, et al.,

Appellants,

v.

ROBERT S. McNAMARA, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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DAVID C. ACHESON,
United States Attorney,

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Washington, D. C. 20530.

QUESTIONS PRESENTED

In the opinion of appellees, the Following questions are presented:

1. Whether this suit for a mandatory injunction to compel the Secretaries of Defense, Army, Navy and Air Force to promulgate across-the-board salary increases for 6,000 Department of Defense teachers employed in the Overseas Dependents School System, was correctly dismissed as an unconsented suit against the United States.

2. Whether the Defense Department Overseas Teachers Pay and Personnel Practices Act, 73 Stat. 213, 5 U.S.C. 2351, et seq., imposes a non-discretionary duty upon the Secretaries of Defense, Army, Navy and Air Force, without regard to budgetary limitations, to review periodically and to raise the basic compensation of overseas teachers to insure that their basic compensation remains equal to the pay accorded comparable teaching positions in the United States.

INDEX

CITATIONS

Cases:

Statutes and Regulations:

Miscellaneous:

* Cases or authorities chiefly relied upon are marked by asterisks.

IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 19,132

CHRISTINE MITCHELL, CECIL DRIVER, JOHN ALIANO, NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES, a corporation, and OVERSEAS EDUCATION ASSOCIATION, an unincorporated association,

Appellants,

v.

ROBERT S. McNAMARA, Secretary of Defense of the United States, STEPHEN AILES, Secretary of the Army, PAUL H. NITZE, Secretary of the Navy and EUGENE M. ZUCKERT, Secretary of the Air Force,

Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

1. Introduction. Appellants, three individual teachers and two teachers organizations, sought a mandatory injunction to compel the Secretaries of Defense, Army, Navy and Air Force to institute higher salary schedules for 6,000 school teachers employed overseas by the Department of Defense. The relief sought, if granted, would require an additional minimum annual government expenditure of four million dollars ($4,000,000.00) on such salaries. From the order of the district court entered on November 30, 1964, denying their motion for summary judgment and dismissing their complaint (J.A. 47-48), appellants have taken this appeal.

Appellants' complaint for relief in the nature of mandamus is bottomed on their understanding of the Defense Department Overseas Teachers Pay and Personnel Practices Act, 73 Stat. 213, 5 U.S.C. 2351 (hereafter, "Overseas Teachers Pay and Personnel Practices Act,")as implemented by instructions entitled "Salary Determination Procedures, Overseas Dependents School Teaching Positions Class I," promulgated by the Secretary of Defense pursuant to the Act (J.A. 2-8). A full evaluation of the decision below requires first a consideration of the legislative basis upon which the Defense Department's Overseas Dependents School System itself rests, together with the personnel problems encountered in the operation of that School System which the Act and the instructions upon which appellants rely were intended to remedy.

2. Background. Congress has not enacted permanent,

comprehensive legislation to provide for the education of the Defense Department's military and civilian personnel stationed abroad. Rather, it has chosen to authorize the present Overseas Dependents School System on a year to year basis.[1] Annually in the appropriations acts for the Department of Defense Congress has included a provision to the effect that:

> Appropriations for the Department of Defense for the current fiscal year shall be available . . . for primary and secondary schooling for minor dependents of military and civilian personnel of the Department of Defense residing on military or naval installations or stationed in foreign countries, . . . in amounts not exceeding an average of $285 per student, when the Secretary of the Department concerned finds that schools, if any, available in the locality, are unable to provide adequately for the education of such dependents . . . .[2]

Except for the average dollar amount per student to which the Department of Defense expenditures are limited, the substance of the statutory language has remained the same both before and after the passage in 1959 of the Overseas Teachers Pay and Personnel Practices Act.[3] There is no question that, before the passage of that Act, the Department of Defense was bound as a matter of law to keep the expenditures directly attributable to the operations of the Overseas Dependents School System within those limiting figures.[4]

1/ Hearings on H.R. 1871 and related bills before Subcommittee on Civil Service of the House Committee on Post Office and Civil Service, 86th Cong., 1st Sess., p. 20, April 23, 1959.

2/ P.L. 88-149, Sec. 506, 88th Cong., 1st Sess., 77 Stat. 254, 264, making appropriations for the Department of Defense for the fiscal year ending June 30, 1964.

3/ See, 66 Stat. 533, § 616 (Fiscal 1953); 67 Stat. 351, § 614 (1954); 68 Stat. 351, § 709 (1955); 69 Stat. 315, § 609 (1956); 70 Stat. 468, § 607 (1957); 71 Stat. 323, § 607 (1958); 72 Stat. 724, § 606, as amended, 72 Stat. 867 (1959); 73 Stat. 378, § 606 (1960); 74 Stat. 350, § 506 (1961); 75 Stat. 375, § 606 (1962); 76 Stat. 328, § 506 (1963); 77 Stat. 264, § 506 (1964).

4/ H.R. Rep. No. 2104, 84th Cong., 2d Sess., p. 22, May 3, 1956.

Through 1959, teachers engaged to work in the Overseas Dependents School System were governed by the requirements of the Classification Act of 1949 and the Annual and Sick Leave Act of 1951.[5] Those Acts apply generally to government personnel and contemplate persons employed for a full calendar year.[6] The overseas teachers' services, like the services of most school teachers, were necessary only for the usual school year of nine to ten months. However, as a direct result of the Classification and Leave Acts, the teachers could be paid only a proportionate amount of the specified annual salary for their grade, could not be paid during the summer vacation or during the usual Christmas, Easter and Thanksgiving recesses unless they had annual leave available, and, if they were placed in a leave-without-pay status, their overseas differentials and allowances were discontinued. Additionally, no authority existed to equate the overseas teachers' pay to their academic background and qualifications, in accordance with general practice in the United States. While the conditions of their overseas employment were explained to the teachers at the time they were recruited, representatives of the teachers' organizations explained to Congress that misunderstandings among the teachers were frequent because the practices were so dissimilar from those with which most of them were familiar.[7] To overcome

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5/ The Classification Act of 1949, 5 U.S.C. 1071, covers all executive department employees unless specifically exempted. 5 U.S.C. 1081, 1082. The provisions of the Annual and Sick Leave Act of 1951 are similar. 5 U.S.C. 2061.

6/ The problems are discussed in S. Rep. 141, 86th Cong., 1st Sess.; H.R. Rep. 357, 86th Cong., 1st Sess.; and in published Hearings Before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service on H.R. 1871, 86th Cong., 1st Sess., April 23, 1959.

7/ Hearings on H.R. 1871 and Related Bills before a Subcommittee of the House Committee on Post Office and Civil Service, 86th Cong., 1st Sess., p. 37, April 23, 1959.

these problems, the Overseas Teachers Pay Act was proposed.[8/]

We note at this point, however, that dissatisfaction with the general, over-all salary level for overseas teachers was not put forward, either in the hearings[9/] or in the reports of the sponsoring congressional committees,[10/] as a reason for the proposed legislation. Nor is any suggestion found in either of those sources that the intent of the Act was to provide a mechanism for insuring automatic pay raises in the future for overseas teachers. To the contrary, appellants' own representative disclaimed any such understanding of the Act. The chairman of appellant Overseas Teachers Association's Legislative Committee, in testifying before the subcommittee, stated, "As we realize, this is not a pay raise bill and we are not going to be handing everyone $3,000. This is, of course, recognizable."[11/] Those statements were echoed on the floor of Congress by Representative Foley, a member of the sponsoring committee.[12/] Significantly, Mr. Foley and the subcommittee were fully aware both of the legislative background under which the Overseas Dependents School System was maintained and

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8/ S. Rep. 141, 86th Cong., 1st Sess.; H.R. Rep. 356, 86th Cong., 1st Sess.

9/ Hearings on H.R. 1871 and Related Bills before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service, 86th Cong., 1st Sess., April 23, 1959.

10/ S. Rep. 141, 86th Cong., 1st Sess.; H.R. Rep. 356, 86th Cong., 1st Sess.

11/ Testimony of Miss Mary Hoague, Chairman, Legislative Committee, Overseas Teachers Association; Hearings on H.R. 1871 and Related Bills, etc., p. 37. See also her responses to questions by Representative Gross, id. at pp. 41-42.

12/ 105 Cong. Rec. 12,711.

of the effect of the annual Congressional per pupil limitation on expenditures.[13]

3. The Act. The Overseas Teachers Pay and Personnel Practices Act became law on July 17, 1959. The Act did not purport to establish the Overseas Dependents School System on a permanent footing, nor otherwise to disburb the annual basis of the School System's existence. Rather, it concerned itself with the problems in the School System's personnel practices which had been aired before Congress.

Among other provisions, the Act exempted teachers in the Overseas Dependents School System from coverage under the Classification Act of 1949[14] and the Annual and Sick Leave Act of 1951.[15] It did not, however, substitute detailed legislation for those enactments. Rather, it delegated to the Secretary of Defense (5 U.S.C. 2352(a)) broad authority to "prescribe and issue regulations to carry out the purposes of this [Act]," governing:

(1) the establishment of teaching positions;

(2) the fixing of the rates of basic compensation for teaching positions in relation to the rates of basic compensation for similar positions in the United States;

(3) the entitlement of teachers to compensation;

(4) the payment of compensation to teachers;

(5) the appointment of teachers;

(6) the conditions of employment of teachers;

13/ Hearings on H.R. 1871 and Related Bills, etc., p. 20.

14/ 73 Stat. 213, Sec. 3, 5 U.S.C. 1082(32).

15/ 73 Stat. 217, Sec. 10, 5 U.S.C. 2358.

(7) the length of the school year or school years applicable to teaching positions;

(8) the leave system for teachers;

(9) quarters, allowances, and additional compensation for teachers; and

(10) such other matters as may be relevant and appropriate to the purposes of this chapter.

Further provisions were directed to the Secretaries of the individual military departments, whose individual departments are the actual employers of the teachers in the School System.[16/] Those officials were directed, inter alia (5 U.S.C. 2353(a), emphasis added), to:

> conduct the employment and salary practices applicable to teachers and teaching positions in his military department in accordance with this chapter, other applicable law, and the regulations prescribed and issued by the Secretary of Defense under section 2352 of this title.

That section further provided (5 U.S.C. 2353(c)) that:

> The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia.

The Act did not in itself, however, purport to establish a specific pay scale for the teachers in the School System. Nor did it specify which teaching positions in the United States were "similar" to those overseas for purposes of fixing the salaries of the overseas teachers "in relation to" them.

16/ The three individual appellants allege that each is employed by a separate military department (J.A. 2-3).

Further, the Act contains no provisions requiring review of the adequacy of teachers' salaries once established, and is similarly barren of any provision making mandatory adjustments in the compensation of overseas teachers whenever teaching salaries in the United States might increase or decrease.

4. The Regulations. The pertinent regulations promulgated by the Secretary of Defense pursuant to the Act are entitled, "Salary Determination Procedures, Overseas Dependents School Teaching Positions, Class 1. (J.A. 9-12). In the Procedures, the Secretary set guidelines which would be followed in establishing the basic compensation for teachers in the overseas dependents schools. Those guidelines provided, inter alia, that teaching salaries overseas would be related to compensation paid in urban school districts of 100,000 population and over, and that longevity increases would be similarly accorded. ¶4, Comment 1 (J.A. 10-11). The Procedures also indicated that, if American school salaries continued to rise, related adjustments in the overseas school system salary scale would also be made on an annual basis. ¶4, Comment 2. (J.A. 11). However, the Procedures stated, any such salary raises were contingent upon a sufficient increase in the per pupil limitation of the appropriation acts to permit higher salaries to be paid. In particular, the Procedures provided (¶3; J.A. 18):

> Salary data for teaching positions will be obtained and analyzed on a timely basis and the results will be utilized to seek adjustment in the per pupil limitation sufficient to permit warranted increases in the compensation schedule. COMMENT. It must be recognized that the per pupil limitation established by the Congress determines the maximum amount which can be spent

in the operations of the dependents schools. Since salaries comprise a substantial part of operating costs it is expected that in the future the per pupil limitation will have to be increased before salaries can be adjusted.

The Procedures concluded with a caveat (¶5; J.A. 11-12):

> When the per pupil limitation is known, final determination as to an appropriate adjustment will be made. Adjustments in the compensation schedule will be made coincident with the beginning of the school year.
>
> COMMENT 1. It is planned that if the per pupil limitation is increased sufficiently to effect adjustments as provided above, such adjustments will be ordered into effect. There may be times, however, when the per pupil limitation will permit only part of the adjustment being made effective. Final determination of the adjustment, therefore, should await decision on the per pupil limitation.

5. Congressional Refusal To Appropriate Funds Sufficient To Implement the Salary Increases.

Following the passage of the Act and the Secretary's promulgation of the implementing Procedures, Congress increased the per student limitation so as to permit the Secretary of Defense to establish the Salary Scale for overseas teachers contemplated by the Procedures. However, while in succeeding years the average salaries paid teachers in the United States has risen steadily, the per pupil limitation has not kept pace. Annually, in hearings before the House and Senate appropriations committees, the Department of Defense has advised Congress that the per pupil limitation has restricted the amount available to adjust the overseas teachers compensation in relation to those paid in the United States, as contemplated in the Procedures. 17/

17/ See, e.g., Hearings Before the Subcommittee on Department of Defense Appropriations of the House Committee on Appropriations for the 87th Cong., 1st Sess., Part 6, pp. 138-150; 87th Cong., 2d Sess., Part 3, pp. 718-722; 88th Cong., 1st Sess., Part 4, pp. 981-1007.

Notwithstanding the Defense Department's requests for additional funds, Congress has refused to increase the per pupil limitation sufficiently to allow the contemplated salary adjustments. In the 1964 budget, as the complaint points out (J.A. 5), the per pupil limitation was increased from $280 to $285, and the Secretary authorized a raise of $100.00 per year to teachers in the School System. However, despite the 1965 budget request that the per pupil limitation be raised from $285 to $295, 18/ the House Committee on Appropriations stated:

> The 1965 budget estimate provides an increase in the per pupil limitation from the current annual allowance of $285 per pupil to $295 per pupil. The Committee recommends that the current limitation of $285 be continued in the 1965 fiscal year . . . .
>
> If the per pupil limitation is to have any real meaning as a budgetary control, it should be representative of the total direct costs that can be charged against the program. In preparing the budget estimates for the 1966 fiscal year, the Department [of Defense] should be governed accordingly. 19/

Moreover, an attempt by the Department to delete certain items which had historically been treated as coming within expenditures covered by the per pupil limitation, thus leaving additional funds for the payment of teachers' salaries, was also flatly rejected:

> In regard to funding for oversea dependents' schools, the committee has approved the funds provided

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18/ See, Hearings before the Subcommittee on Department of Defense Appropriation of the House Committee on Appropriations, 88th Cong., 2d Sess., Part 2, pp. 643 ff.; Hearings before the Subcommittee of the Committee on Appropriations of the United States Senate on H.R. 10939, 88th Cong., 2d Sess., Part 2, pp. 765-766.

19/ H.R. Rep. 1329, 88th Cong., 2d Sess., pp. 27-28.

> by the House for the operation of such schools and has agreed to the provision contained in section 506 of the House bill, providing a per pupil limitation of $285. The limitation of $285 should be considered to be on the basis of the accepted criterion which has been utilized for a number of years and which includes Canal Zone tuition, dormitory monitors and indigenous teachers. [The items sought to be deleted by the Department from the limitation]. The committee sees no reason for the Department of Defense to alter the criterion. The committee also believes that the present funding is sufficient to provide adequately for teachers' salaries, particularly in view of the fact that the Department has no difficulty whatever in recruiting qualified personnel. 20/

The per pupil limitation for the fiscal year ending June 30, 1965, was retained at $285, 78 Stat. 475, Sec. 506; 1964 U.S. Code Cong. and Adm. News, 88th Cong., 2d Sess., p. 2691.

6. The proceedings below. The instant suit was commenced on March 2, 1964, by three individual teachers employed in the Overseas Dependents School System, the National Education Association of the United States, Inc., and the Overseas Education Association (J.A. 2-3). The complaint alleged that it was brought on behalf of all the teachers in the School System and named as defendants the incumbent Secretaries of Defense, Army, Navy, and Air Force. It alleged, in substance, that defendants were not paying teachers employed in the Overseas Dependents School System at the salary levels required by the Overseas Teachers Pay Act (J.A. 2-8).

Accordingly, the complaint asked that the district court grant (1) relief in the nature of mandamus or a mandatory injunction to compel the defendants to promulgate a new salary schedule for teachers employed in the School System "in

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20/ S. Rep. 1238, 88th Cong., 2d Sess., pp. 17-18, July 24, 1964, emphasis added.

accordance with the 1959 Act, 5 U.S.C. §§ 2351-2358, as interpreted by the [Department of Defense Salary Determination] Procedures, [Overseas Dependents School Teaching Positions]";
(2) " that the Court declare that the limitations in the various appropriations acts neither negate nor mitigate Defendants' obligation to fix ODS teachers' compensation pursuant to law"; and
(3) that the Court declare that 5 U.S.C. 2351-2358 requires a periodic review and adjustment of the overseas teachers' salaries (J.A. 8).

The Government moved in the alternative for summary judgment or a dismissal of the complaint on grounds, inter alia, that the action was an unconsented suit against the United States; that the issuance of mandamus would be an unconstitutional interference with the exercise of discretionary functions entrusted by Congress to the executive branch, and that the Overseas Teachers Pay and Personnel Practices Act did not entitle plaintiffs to automatic salary increases (J.A. 12-13). The plaintiffs filed a cross-motion for summary judgment (J.A. 44-45).

The district court denied both motions for summary judgment and granted the Government's motion to dismiss the complaint (J.A. 47-48). The plaintiffs duly noted an appeal to this Court (J.A. 48).[20a/]

20a/ A separate suit for back pay has been instituted in the Court of Claims by two teachers in the Overseas Dependents School System. Joseph B. Crawford, et al., v. United States, No. 83-65, filed March 18, 1965. Mr. Joseph B. Crawford is President of the Overseas Education Association, one of the appellants in this case. While that action has been commenced by different parties represented by different counsel, relief is asked on the same
(continued)

STATUTES INVOLVED

The relevant provisions of the Department of Defense Overseas Teachers Pay and Personnel Practices Act, 73 Stat. 213, 5 U.S.C. 2351, et seq., and the relevant Department of Defense regulations, "Salary Determination Procedures, Overseas Dependents School Teaching Positions, Class 1," are set forth in full in an appendix attached to the Brief for Appellants.

20a/ (continued) grounds presented in the case at bar. Although the Court of Claims suit is not framed as a class action, the petition there states: "Your plaintiffs wish to note that while they are suing in their individual capacities there are several hundred other similarly situated teachers who intend to present their claims to this Court after it has had the opportunity to rule on the legal issues involved, and are withholding such claims at this time in order to save this Court the arduous task of examining many hundreds of claims prior to the resolution of the basic legal issues."

SUMMARY OF ARGUMENT

I

Appellants seek a mandatory injunction to compel the Secretary of Defense and the other appellees to raise the salaries of 6,000 overseas teachers. A minimum of four million dollars annually would be necessary to meet appellants' demands, which sum would have to be obtained either by additional funds from the Treasury or by curtailing expenditures for other necessary portions of the Defense Department's Overseas Dependents School System. Accordingly, this is a suit against the United States, notwithstanding that public officers are the nominal defendants, because the relief sought would expend itself in the public Treasury or interfere with the operations of the Government. Dugan v. Rank, 372 U.S. 609, Hawaii v. Gordon, 373 U.S. 57. Therefore, the consent of the United States is a prerequisite to the maintenance of the action, unless the public officers are either (1) acting in excess of their legislative or constitutional authority, or (2) failing to carry out a ministerial duty owed to appellants. Dugan v. Rank, supra; Hawaii v. Gordon, supra; Panama Canal Co. v. Grace Line, Inc., 357 U.S. 309. The former exception does not come into play here, because appellants themselves insist that appellees have ample authority to implement the salary increase but refuse to do so. To come within the second exception, it must appear that appellees' alleged duty to raise appellants' salaries is "peradventure clear" entirely ministerial. Panama Canal Co. v. Grace Line., Inc., supra. The provision of the Defense Department Overseas Teachers Pay and Personnel Practices

Act upon which they rely, 5 U.S.C. 2353(c), does not expressly call for obligatory periodic pay increases. The Congressional committee reports and the testimony in the hearings on the Act refute the suggestion that any such mandatory raises were intended. Contemporaneous administrative interpretation of the Act, upon which petitioners themselves rely, was that any pay raises were dependent upon increased congressional appropriations. With full knowledge of appellants' contentions, Congress has refused such additional appropriations and has approved budgets reflecting the present salary scale for overseas teachers. The district court therefore was correct in dismissing the complaint as an unconsented suit against the United States because the Act does not impose a ministerial obligation on the appellants to raise the compensation of overseas teachers in disregard of Congressional appropriations.

II

Moreover, even on the merits the decision below should be affirmed. The statutory provision upon which appellants rely, 5 U.S.C. 2353(c), was not intended as a pay raise provision. It is a substitute for Compensation Act provisions which govern the salary schedules of most federal employees, but which caused personnel problems when applied to the overseas school teachers who work less than a full calendar year. The Committee reports make clear that mandatory pay raises for overseas school teachers were not a purpose of the Overseas Teachers Pay and Personnel Practices Act. Further, in the committee hearings on the Act,

appellants' own representative testified unequivocally that the proposed legislation was not intended as a pay raise measure. Similar statements were repeated by members of the sponsoring Civil Service Committee on the floor of the House. Contemporaneous administrative interpretation of the Act was that it gave the Secretary of Defense limited discretion to raise overseas teachers salaries subject, however, to additional Congressional appropriations. Congress has refused to accede to the Secretary's repeated requests for additional funds and, with full knowledge of appellants' views, has refused to treat the Act as one imposing a mandatory duty on the Secretary to increase overseas teachers' salaries periodically. The raises sought are matters within the Secretary's discretion. In the circumstances of Congress' refusal to provide sufficient funds, his refusal to accede to appellees' salary demands was not an abuse of that discretion.

ARGUMENT

It is our position that the Overseas Teachers Pay and Personnel Practices Act does not establish a mandatory requirement for periodic pay increases for the overseas teachers without regard to the per pupil limitation on Overseas Dependents' School System expenitures, a limitation which Congress regularly imposed both before and after the passage of that Act with full awareness of its effect. However, we are also of the view that the district court correctly dismissed the complaint because this action is in reality a suit against the United States to which it has not consented. We therefore deal first with that jurisdictional problem, reserving until last our consideration of the merits of the claim.

I

THIS ACTION WAS CORRECTLY DISMISSED AS AN UNCONSENTED SUIT AGAINST THE UNITED STATES.

1. This is a suit against the United States. Appellants have framed their complaint in the form of an injunctive action directed against officials of the Government. This nominal form of the complaint is, of course, not determinative of whether the action is in reality one against the United States. Rather, "the government's interest must be determined in each case 'by the essential nature and effect of the proceeding, as it appears from the entire record.'" Mine Safety Co. v. Forrestal, 326 U.S. 371, 374. The standard to be applied in making that determination has recently been restated by the Supreme Court in Dugan v. Rank, 372 U.S. 609, 620 (1963):

> The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," Land v. Dollar, 330 U.S. 731, 738 (1947), or if the effect of the judgment would be "to restrain the government from acting, or to compel it to act." Larson v. Domestic & Foreign Corp., [337 U.S.] at 704; Ex parte New York, 256 U.S. 490, 502 (1921).

The application of that test leaves no room for doubt that this suit is one against the United States. The complaint seeks a mandatory order to compel a cabinet officer and the heads of the military departments of the Government to promulgate a new, higher salary schedule for some 6,000 employees of the Department of Defense (J.A. 8). It further requests that the court declare that the "per pupil" limitations fixed by Congress on expenditures for the Overseas Dependents' School System "neither negate nor mitigate Defendants' obligation to fix ODS teachers' compensation pursuant to law." (J.A. 8). It is apparent that this relief, if granted, would operate directly against the United States by requiring expenditures from the Treasury of additional sums for teachers' salaries running in excess of four million dollars ($4,000,000.00) annually.[20b/]

20b/ In their brief (p. 6) appellants claim that for the 1965-1966 school year, ODS starting salaries are deficient by at least $735.00 per year. Since there are some six thousand teachers in the School System, the additional expenditure each year would be approximately 6000 x $735, or $4,310,000.00. As we noted above, n. 20a, p. 11, a suit for back pay has also been commenced in the Court of Claims by other overseas teachers similarly situated.

This action would be no less a suit against the United States under the suggestion in appellants' complaint (J.A. 7) that the Government could remain within the annual per pupil limitation either by curtailing School System expenditures other than for teachers' salaries or by discharging a substantial number of the teachers in the System. 21/ Since the teachers' salaries already absorb nearly 70% of the Overseas Dependents' School System Budget (J.A. 44), it is obvious that either of those alternatives would have a serious impact on the operation of the schools. Appellants thus offer the Government a Hobson's choice, either to increase substantially the pupil-teacher ratio, or to reduce expenditures on equipment, maintenance, textbooks, etc. As the affidavits introduced below indicate (J.A.20-44), either step would cripple some vital function of the School System. Thus, even assuming arguendo that increased expenditure from the Treasury could be avoided, the grant of the relief appellants seek would, of necessity, "interfere with the public administration," Land v. Dollar, supra. In short, here as in Hawaii v. Gordon, 373 U.S. 57, 58:

> [T]he order requested would require the [public official's] affirmative action, affect the public administration of government agencies and cause as well the disposition of property admittedly belonging to the United States.

21/ Appellants' third suggestion, that the appellees simply shift to other appropriations some of the other expenditures regularly included within to the per pupil limitation (J.A. 7), was attemptedby the Department of Defense last year and, as we noted above, rejected by Congress. See S. Rep.1238, 88th Cong., 2d Sess., pp. 17-18, July 24, 1964, the pertinent parts of which are set out supra, pp. 10-11.

This case is, therefore, squarely within the general rule that "relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter," and therefore "is a suit against the United States and, absent its consent, cannot be maintained." Ibid. See also, Malone v. Bowdoin, 369 U.S. 643; Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309; Reisman v. Caplin, 115 U.S. App. D.C. 212, 317 F. 2d 123, affirmed, 375 U.S. 440; United States ex rel. Brookfield Construction Co., Inc. v. Stewart, ___ U.S. App. D.C. ___, 339 F. 2d 753.

2. The United States has not consented to this suit. We do not understand appellants to claim that the Defense Department Overseas Teachers Pay and Personnel Practices Act itself manifests the Government's consent to be sued (as indeed a cursory reading of that Act shows it does not). Rather, they invoked the jurisdiction of the district court under 28 U.S.C. 1331 and 28 U.S.C. 1361 (Br. p. 1). The former section is the general grant of jurisdiction to the federal trial courts; it is not, however, legislative authorization to seek injunctive or mandatory relief against the United States. Anderson v. United States, 229 F. 2d 795, 797 (C.A. 5), Cf., Blackmar v. Guerre, 342 U.S. 512, 515-516.

Nor does 28 U.S.C. 1361 manifest any general consent of the United States to suit. That section provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee to perform a duty owed to the plaintiff.

As the legislative history and the cases applying that provision make clear, 28 U.S.C. 1361 was not intended to create new liabilities or

new causes of action against the United States Government. Rather, its intent was to permit suit against government officials in the circumstances where, prior to the enactment, such actions could only be brought in the United States District Court for the District of Columbia under that court's common-law mandamus jurisdiction. 22/ Thus, to maintain this action, it is incumbent upon appellants to bring themselves within the limited circumstances where suits for injunctive or mandatory relief against public officers are permissible. As we now show, this action is not within those circumstances.

3. Mandamus or injunctive relief is not authorized in the circumstances of this case. To be sure, there are exceptions to the general rule precluding suits against public officers which are in reality against the Government itself. As the Supreme Court most recently outlined in Dugan v. Rank, 372 U.S. 609, 621, such exceptions are recognized in cases involving:

> (1) Actions by officers beyond their statutory powers, and
>
> (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are uncontitutionally void. 23/

22/ S. Rep. 1992, 87th Cong., 2d Sess., August 31, 1962; Smith v. United States, 333 F. 2d 70, 72 (C.A. 10); Seebach v. Cullen, 224 F. Supp. 15 (E.D. Pa.); McEachern v. United States, 212 F. Supp. 706, 712 (W.D.S.C.), modified on other grounds, 321 F. 2d 31 (C.A. 4).

23/ Accord: Malone v. Bowdoin, 369 U.S. 643; Larson v. Domestic & Foreign Corp., 337 U.S. 682.

Neither of those exceptions are applicable here. It is apparent that appellants' complaint is not that the Secretary of Defense has acted beyond the constitutional or legislative bounds of his authority in failing to authorize salary increases for overseas teachers. Rather, their complaint is just the opposite. The Secretary, appellants insist, has ample authority to grant such increases, but he refuses to act. In these circumstances, relief is available only where "ministerial duties of a nondiscretionary nature are involved." Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 318; United States ex rel. Girard Co. v. Helvering, 301 U.S. 540, 543; United States ex rel. Chicago Great Western R. v. I.C.C., 294 U.S. 50; United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 419-420; Interstate Commerce Comm'n. v. New York, N.H. & H.R. Co., 287 U.S. 178, 203; Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 218-219; Work v. Rives, 267 U.S. 175, 177. Section 1361 of Title 28 is restricted precisely to such situations. [24]

Moreover, the Supreme Court cases also teach that mandamus will issue against a public official only "where the matter is

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24/ S. Rep. 1992, 87th Cong., 2d Sess., pp. 4-5: "The Department of Justice in its report on the bill expressed concern that the bill might be interpreted to give the district courts jurisdiction to order a Government official to act in a manner contrary to his discretion. The committee, therefore, has adopted the amendment set forth to section 1 which specifies that the court can only compel the official or agency to act where there is a duty, which the committee constructs as an obligation, to act, or, where the official or agency has failed to make any decision in a matter involving the exercise of discretion, but only to order that a decision be made and with no control over the substance of the decision." See also the cases cited at note 22, supra.

peradventure clear," Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 318; "But where the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion," and mandatory relief is precluded. Ibid. See also, United States ex rel. Chicago Great Western R. v. I.C.C., supra, 294 U.S. at 62-63.

Indeed, the circumstances presented in Panama Canal Co. v. Grace Line, Inc., so closely parallel those of the case at bar that we submit it is dispositive of this appeal. The Canal Company is a government agency which operates the Panama Canal, the Grace Line a frequent user of that waterway. Pursuant to an Act of Congress, the Canal Company was authorized to regulate the toll charges for use of the Canal, but the Act also contained a formula which the agency was required to employ in computing new tolls. 25/

25/ Canal Zone Code, Title 2, §§ 411, 412, 64 Stat. 1038.

Section 411:

> The Panama Canal Company is authorized to prescribe and from time to time change (1) the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following, the tolls that shall be levied for the use of the Panama Canal: Provided, however, That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: Provided, further, That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in basic rules of measurement and of any and all proposed changes in rates of tolls, during which period a public
>
> [continued]

The Grace Line brought suit to compel the Canal Company to fix new, lower tolls. The gravamen of its complaint was that the Canal Company had failed to comply with the express Congressional directive because it had improperly allocated certain expenses of running the Canal Zone Government among those costs to be borne by the users of the Canal. The Grace Line's assertions were wholly concurred in by an independent report of the Comptroller General of the United States.

The district court dismissed the complaint, 143 F. Supp. 539, but the court of appeals reversed and entered partial summary judgment for the Grace Line, 243 F. 2d 844 (C.A. 2). In its unanimous decision reversing the Second Circuit and reinstating the dismissal of Grace Line's complaint, the Supreme Court turned its decision on the fact that the Act in question was not "peradventure clear" and was compelled to infer "that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision." 356 U.S. at 318.

25/ [continued]

> hearing shall be conducted: And provided further, That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive.
>
> Section 412(b):
>
> Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances relating thereto, including interest and depreciation, and an appropriate [continued]

The Supreme Court gave great weight in reaching that conclusion to the fact that the Canal Company was on close terms with the appropriate Congressional Committees, who were, in fact, repeatedly informed of the particular problem and of the pending litigation. The Court found particularly persuasive the fact that, notwithstanding its complete awareness of the dispute over the toll computations, Congress repeatedly approved the budgets of the Panama Canal Company based on the Company's interpretation of the toll formula. For those reasons, the Court found it "at least arguable that Congress to date has sided with the" Canal Company. This, in the Court's view, was sufficient to indicate that the question was one for agency discretion, concluding that matters "should be far less cloudy, much more clear for courts to intrude." See 356 U.S. 318-319 and nn. 3 and 4 on p. 319.

The situation in the case at bar is, if anything, far more cloudy. Appellants want to compel the Secretary of Defense to grant automatic, periodic pay raises to overseas teachers without regard to budgetary restrictions imposed by Congress. The statutory language upon which they rely provides (5 U.S.C. 2353(c)):

25/ [continued]

> share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

> The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States . . .

That position, however, does not indicate which teaching position in the United States are "similar" to those abroad. Nor is the relationship between overseas and American teaching compensation spelled out. Nor is it at all patent that, once fixed initially, overseas teachers' salaries are absolutely required to be adjusted either upward or downward in the future; and, if such adjustments are to be made, when, to whom, in which circumstances, and under what conditions? In short, it can hardly be said that the statute is "peradventure clear" on these matters.

Discretion to resolve those questions has been placed by Congress in the Secretary of Defense. 5 U.S.C. 2352(a), and the secretaries of the military departments are bound to follow his regulations. 5 U.S.C. 2353(a). As was the government agency in the Panama Canal Company case, the Secretary is called upon to base his actions on inferences drawn from large and loose statutory terms in order to give meaning to the Act, which understanding he set forth in the Salary Determination Procedures, Overseas Dependents School Teaching Procedures, Class 1 (J.A. 9-12).

We do not understand appellants to dispute that the statutory provision upon which they rely is neither complete nor self-executing and that no interpretation was needed. Indeed, they rely themselves on the Secretary's Procedures insofar as those instructions resolve the question of comparable United States salaries, in-grade raises

and periodic reviews and adjustments of their basic compensation (J.A. 4-8). However, while appellants are thus willing to afford "peculiar weight [to the] contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion" (Br. p. 19) so long as that construction is in their interest, they do not give similar weight to the equally contemporaneous construction by the same men in the same regulation that cuts against them. For the very Procedures which interpret the Act as authorizing pay increases when comparable United States teachers' salaries rise, also reached the added conclusion that any such increases are contingent upon budgetary limitations imposed by Congress. 26/

26/ Procedures:

¶3. Salary data for teaching positions will be obtained and analyzed on a timely basis and the results will be utilized to seek adjustment in the per pupil limitation sufficient to permit warranted increases in the compensation schedule.
COMMENT: It must be recognized that the per pupil limitation established by the Congress determines the maximum amount which can be spend in the operations of the dependents schools. Since salaries comprise a substantial part of operating costs it is expected that in the future the per pupil limitation will have to be increased before salaries can be adjusted. The most appropriate time to start administrative action to obtain an increase in the per pupil limitation is in August of each year, the time at which final budget preparation for the following fiscal year commences. This means that determination as to warranted salary adjustments must be made in July of each year.
¶5. When the per pupil limitation is known, final determination as to an appropriate adjustment will be made. Adjustments in the compensation schedule will be made coincident with the beginning of the school year.
COMMENT 1: It is planned that if the per pupil limitation is increased sufficiently to effect adjustments as provided above, such adjustments will be ordered into effect. There may be times, however, where the per pupil limitation will permit only part of the adjustment being made effective. Final determination of the adjustment, therefore, should await decision on the per pupil limitation.

It is not necessary to our point that the Secretary of Defense is absolutely correct. Rather, the very fact that debatable inferences could be fairly drawn from the loose statutory language means that the Secretary was compelled to exercise his discretion to resolve them. In such circumstances, Panama Canal Co. v. Grace Line, Inc., teaches that mandamus will not issue to compel the exercise of discretion in a particular manner. 27/

We are reinforced in our belief that the circumstances under which overseas teachers' salaries will be adjusted has been committed to the discretion of the Secretary of Defense by the structure of the Overseas Teachers Pay and Personnel Practices Act itself. As we noted above, appellants have rested their case on 5 U.S.C. 2353(c). However, as careful examination of the entire Act reveals, that subsection is not the operative provision regarding the fixing of the rates of teachers pay. Section 2353(c) is directed to the secretaries of the military departments. But those officials are in turn required by 5 U.S.C. 2353(a) "to conduct the salary practices applicable to teachers and teaching positions in his military departments in accordance with *** the regulations issued by the Secretary of Defense under [5 U.S.C.] 2353 ***." 28/

5 U.S.C. 2353 is the key provision. It provides in subsection (a):

> (a) Not later than the ninetieth day following July 17, 1959, the Secretary of Defense shall prescribe and issue regulations to carry out the purposes of this chapter. Such regulations shall govern--
>
> (1) the establishment of teaching positions;
>
> (2) the fixing of the rates of basic compensation for teaching positions in relation to the rates of basic compensation for similar positions in the United States;

27/ See also note 24, supra.

28/ See S. Rep. No. 141, 86th Cong., 1st Sess., p. 3.

(3) the entitlement of teachers to compensation;
(4) the payment of compensation to teachers;
(5) the appointment of teachers;
(6) the conditions of employment of teachers;
(7) the length of the school year or school years applicable to teaching positions;
(8) the leave system for teachers;
(9) quarters, allowances, and additional compensation for teachers; and
(10) such other matters as may be relevant and appropriate to the purposes of this chapter.

Putting aside for the moment subsection (a)(2) (which deals with the fixing of teachers' salaries), it is clear that the other numbered subsections plainly call for the exercise of the discretion of the Secretary of Defense. Thus, under (a)(1), the Secretary must decide how many teaching positions will be established in the Overseas Dependents School System. Obviously this figure is dependent on the needs of the Department, the location of the dependents, the requirements of good teaching practices, and, of course, on the money appropriated by Congress to maintain the School System. Subsections (a)(3) and (4) call for him to prescribe standards under which teachers will be placed in appropriate pay categories, as well as the time, place and method of the payment of their compensation. Subsections (a)(5) and (6) require the Secretary to establish standards and qualifications to be met for employment as a teacher in the School System, as well as governing the length of their teaching contracts, the countries and bases at which they shall be employed, and the circumstances under which transfer among bases will be permitted. Subsection (a) (7), relating to setting the length of the teaching year, is obviously a matter committed to the Secretary's discretion. So too are (a)(8)

and (9), which call for regulating vacations, allocation of quarters, and similar matters. Section (a)(10), of course, speaks for itself.

Seen in this context, 5 U.S.C. 2352(a)(2) is obviously not an immutable command to the Secretary, free of all budgetary restrictions. It is set amidst other items, many of which also are affected by the "per pupil" limitation in the Defense budget, and which plainly call for the Secretary to exercise his discretion in providing for them. We submit that in these circumstances the ministerial nature of the Secretary's duties is hardly "peradventure clear." Panama Canal Co. v. Grace Line, Inc., supra; United States ex rel. Chicago Great Western R. v. I.C.C., 294 U.S. 50. [29]

Moreover, as in the Panama Canal Co. case, Congress has been kept fully abreast of the issues involved here. As we pointed out above, pp. 8-10 , annually the Defense Department has gone to Congress with a request that the per pupil limitation be raised so that the overseas teachers' salaries could be increased. Congress has made it quite plain that it does not care to do so. More than that, it has cut back the Defense Department's budgetary requests on grounds "that the present funding is sufficient to provided adequately for teachers' salaries, particularly in view of the fact that the Department as no difficulty whatever in recurting qualified personnel." [30]

29/ See also the cases cited supra, p. 21.

30/ S. Rep. No. 1238, 88th Cong., 2d Sess., pp. 17-18, July 24, 1964. See also the considerable other material to the same effect cited above at pp. 8-10.

As we recounted in detail above, pp. 8-10 , this controversy is one of which Congress has long been aware. On the basis of that legislative history, we feel fully justified in stating that, as in Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 319, "it is at least arguable that Congress sided with" the Secretary of Defense in this matter. Again, our point here is not that the Secretary is undoubtedly correct. Rather, as the Supreme Court stated in denying mandamus relief in Panama Canal Co., such circumstances (356 U.S. at 319):

> [i]ndicate that the question is so wide open and at large as to be left at this stage to agency discretion. The matter should be far less cloudy, much more clear for the courts to intrude.

4. Appellants authorities are not to the contrary. The cases relied upon by appellants do not support the claim that mandamus is available here. To the extent that Roberts v. United States ex rel. Valentine, 176 U.S. 221, 231 (1900), and Lane v. Hoglund, 244 U.S. 174, 182 (1916), can be suggested to have rejected the doctrine that statutory construction is an exercise of administrative discretion (App. Br. pp. 34-35), those cases have been overruled. Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 318-319 (1957); Chicago Great Western R. v. I.C.C., 294 U.S. 50, 62-63 (1935); Wilbur v. Kadrie, 281 U.S. 206, 219 (1930); Work v. Rives, 267 U.S. 175, 183 (1924).

Nor did this Court in Udall v. Wisconsin, Colorado and Minnesota, 113 U.S. App. D. C. 183, 306 F. 2d 790, certiorari denied, 371 U.S. 969, purport to take a position contrary to the Supreme

Court, as is implied by appellants (Br. p. 34), as indeed it could not. That case dealt with the meaning of the single term "hunting-license holder." The majority of the Court held only that this was not a "large or loose statutory term" within the meaning of Panama Canal Co. v. Grace Line, Inc., supra. See 306 F. 2d 790, 793.

We do not quite understand appellants' reliance on West Coast Exploration Co. v. McKay, 92 U.S. App. D.C. 307, 213 F. 2d 582, certiorari denied, 347 U.S. 989 (Br. p. 35). That suit sought relief in the nature of mandatory injunction to compel the Secretary of the Interior to issue a patent to public land in favor of the Exploration Company. This Court, sitting en banc, was in unanimous agreement (albeit for differing reasons, none of which assist appellants here) that the action had to be dismissed for lack of jurisdiction as an unconsented suit against the United States.

We do not view Clackamas County, Ore. v. McKay, 94 U.S. App. D.C. 108, 219 F. 2d 479, (Br. p. 36) to stand for a proposition differing from that which we assert here. As this Court there stated, 219 F. 2d at 494:

> We think it clear from the cases cited that the critical factor in a suit to compel action by an executive officer of the Government is whether the action sought to be compelled is ministerial or involves judgment and discretion.

We think it clear, for the reasons recited, that the actions sought to be compelled here are not ministerial. In any event, appellants can draw no comforting support by analogy to the divided opinion in that case. The Supreme Court vacated this Court's judgment in

Clackamas County as moot, 349 U.S. 909, thus reopening the question there decided and entirely precluding that judgment "from spawning any legal consequences." United States v. Munsingwear, 340 U.S. 36, 40-41.

To be sure, as appellants correctly state, the Supreme Court in Harmon v. Brucker, 355 U.S. 579 (Br. p. 32) directed the Secretary of the Army to issue an "honorable" discharge to a soldier where it has been improperly withheld on the basis of the soldier's pre-induction activities. We have no quarrel with that holding. As the Supreme Court itself characterized it later that same term, Harmon v. Brucker, was an example where the matter of the Secretary's duty was "peradventure clear." Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 318. The Court went on, however, in that later decision to distinguish Harmon for the reasons we discussed above, pp. 22-25 , and to hold that mandamus would not lie to compel the fixing of toll rates. We respectfully submit for the reasons we set out above, that the case at bar is well within the ambit of Panama Canal Co. v. Grace Line, Inc., supra, and that on the basis of that decision, the district court's dismissal of this suit was entirely correct and should be affirmed because this is an unconsented suit against the United States.

II

THE OVERSEAS TEACHERS PAY AND PERSONNEL PRACTICES ACT DOES NOT COMPEL AUTOMATIC, ACROSS-THE-BOARD PAY RAISES FOR ALL OVERSEAS TEACHERS.

For the reasons developed in Part I, we believe the district court correctly dismissed this action as an unconsented suit against the United States. The Court therefore need not, and we believe should not, pass on the merits of this appeal. In any event, however, even on the merits we submit that the decision of the district court should be affirmed.

Section 3 of the Overseas Teachers Pay and Personnel Practices Act [5 U.S.C. 1082(32)] exempted the overseas teachers from the regular Classification Act provisions which fix the basic compensation of most executive branch employees. Section 5 of the Act, 5 U.S.C. 2353, upon which appellants rely, provides substitute procedure for fixing basic compensation applicable to overseas teachers.[31] With regard to salary determination procedures under the Classification Act, after long and careful consideration of the problem, Congress committed itself -- in principle -- to the idea that comparable federal and non-federal positions should receive comparable compensation.[32] However, despite its commitment to that principle, Congress did not provide for automatic, mandatory, across-the-board wage increases for federal employees covered by the Classification Act whenever comparable salaries rose without regard to other considerations. Rather, Congress carefully retained in its own hands the

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31/ S. Rep. No. 141, 86th Cong., 1st Sess., p. 3.

32/ 5 U.S.C. 1171.

final say on the enactment of general salary increases for executive branch employees.[33/]

The gravamen of appellants' position here is that, notwithstanding Congress' general unwillingness to link federal salaries automatically with the compensation for comparable non-federal positions, Congress nevertheless intended to accord such a benefit specially upon the teachers in the Overseas Dependents School System. We respectfully submit that appellants' position is not well taken.

1. The statutory language does not mandate the result appellants demand.

The provision of the Act upon which appellants rely, 5 U.S.C. 2353(c), provides in pertinent part:

> The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States * * *.

Appellants concede that overseas teachers salaries were fixed initially as that section provides (Br. p. 5). They insist, however, that this section also places a "mandatory obligation" upon the Secretary to review those salaries periodically and, if necessary, grant across-the-board wage increases in order to maintain those salaries "generally equal" to salaries for comparable positions in the United States" (Br. p. 10).

The Compensation Act, for which section 2353 is a substitute, contained no such requirements. If such mandatory periodic pay raises were intended as a new and absolute obligation, they are by no means compelled from a reading of the face of 5 U.S.C. 2353(c)

33/ 5 U.S.C. 1172.

alone. As can be seen, that provision makes no mention of periodic reconsideration of salaries once fixed, nor does it contain any express requirement for the Secretary to readjust those salaries in the future, even less make "peradventure clear" that an obligatory, nondiscretionary duty has been placed on that official to do so. We think it fair to assume, then, if such a departure from its usual pay practices were indeed intended by Congress, that such would at least be clearly spelled out in the reports of the committees which sponsored the legislation.

2. The reports of the congressional committees which introduced this legislation do not state as its purpose any intent to compel automatic, mandatory pay increases to insure that overseas teachers salaries remained forever "generally equal" to the pay for comparable positions in the United States. The Act was sponsored by the House and Senate Post Office and Civil Service Committees, whose reports to their respective Houses of the legislature are not lengthy. H.R. Rep. No. 357, 86th Cong., 1st Sess.; S. Rep. No. 141, 86th Cong., 1st Sess. We respectfully invite the Court's careful attention to those documents. Neither contains the slightest suggestion that a purpose of the Defense Department Pay and Personnel Practices Act was to make mandatory future pay increases to the overseas teachers if comparable United States salaries rose. Indeed, the reports indicate clearly that Congress was focusing on quite distinct problems. We quote the "Purpose," "Statement" and "Features of the Proposed System," of the Senate report:[34/]

34/ S. Rep. No. 141, 86th Cong., 1st Sess., pp. 1-2.

PURPOSE

The bill is designed to provide a system of personnel administration for schoolteachers and certain school officers and other employees of the dependents schools operated by the Department of Defense in overseas areas comparable to the systems found in the majority of the public primary and secondary school jurisdictions in the United States.

The proposed system recognizes and corrects deficiencies in the present system which the Department of Defense has identified and which long have been apparent.

STATEMENT

The Department of Defense during the past school year operated 223 elementary schools and 76 secondary schools in overseas areas where military personnel are stationed. These schools were attended by over 100,000 students and employed some 3,900 teachers. A program of comparable size is expected for the forseeable future.

The purpose of these schools is to provide children of our military and civilian personnel stationed overseas an elementary and secondary education equal to the schooling that would otherwise be available to them in the United States.

Most of the problems that exist stem from the fact that the teachers are employed under civil service laws designed for full-time employees. The application of these laws to teachers has created a number of problems mainly because their services are required for only the 9 or 10 months which constitute the school year.

Among the major problems are the following:

First, because the school year covers only 9 or 10 months, teachers receive only nine-twelfth or ten-twelfth of their established annual salary, for there is no authority under which they can be paid during vacation periods.

Second, unless annual leave is available and is used for the purpose, teachers are not paid for school recess periods, such as at Thanksgiving, Christmas, and Easter.

Third, overseas differentials and allowances are discontinued during such recess periods, if the teachers are placed in a leave-without-pay status.

Fourth, there is no authority in law to equate the pay of teachers to their academic background and qualifications, in accordance with the general practices in the United States.

FEATURES OF PROPOSED SYSTEM

> The bill would exempt teachers and certain school officers and other employees from the Classification Act and permit their salaries to be fixed by the Secretary of Defense, taking into account rates of compensation for similar positions in the United States.
>
> The bill exempts these employees from the Sick and Annual Leave Act and establishes a system of sick and emergency leave similar to that provided teachers in the District of Columbia schools.
>
> Finally, the bill provides an equitable method of handling the quarters allowances, cost-of-living allowances, and related matters under regulations to be prescribed by the President.

The House report, cited above, is substantially similar. If a purpose of the Act was to provide mandatory pay raises for overseas teachers, then that purpose was left unstated in the committee reports. However, we do not think any such purpose was inadvertently omitted, because it is clear from sources which we think persuasive that in fact the Act was not intended to be a pay raise measure.

3. In the hearings on the Overseas Teachers Pay and Personnel Practices Act Appellants themselves disclaimed the suggestion that the Act was intended to raise their salaries. As with much legislation, interested parties were invited to express their views on the proposed measure. The hearings before the appropriate House of Representatives subcommittee on this Act are both printed and brief. We respectfully invite the Court's attention to that public document also.[35/] Again, nowhere in that 42 page document is it suggested that the Act was intended to fix, for all time, overseas

35/ Hearings on H.R. 1871 and related bills before the subcommittee on Civil Service of the House Committee on Post Office and Civil Service, 86th Cong., 1st Sess., April 23, 1959.

teachers salaries at a level generally equal to salaries paid teachers in comparable positions in the United States. Not only was no such suggestion made at those hearings, appellants themselves flatly disclaimed the idea that the Act was in any way intended to be a pay raise measure. The Chairman of the Overseas Education Association's Legislative Committee responding to an inquiry from Representative Porter, who was presiding at the hearing, answered:

> As we realize, this is not a pay raise bill, and we are not going to be handing everyone $3,000. This of course is recognizable. 36/

Appellants' representative reiterated that position in response to further inquiry by Representative Gross, who was seeking an explanation why the proposed legislation would cost an additional $270,000 annually if it was not a pay raise measure: 37/

> MR. GROSS: And there are 4,500 teachers. What is going to happen to the $270,000 in relation to the 4,500 teachers?
>
> MISS HOAGUE (of the Overseas Education Association): Mr. Scompayrac [of the Defense Department] indicated that most of this money would go to the people with advanced degrees, that this would be the money figure.
>
> MR. GROSS: So it will be in effect a pay increase no matter how thickly or thinly it is sliced?
>
> MISS HOAGUE: No; for those people with advanced degrees, it will give them the recognition that they would have in almost any school system in the United States.
>
> MR. GROSS: That is dealing in semantics.
>
> MISS HOAGUE: Every teacher is not going to have this advanced degree, you see.
>
> MR. GROSS: I did not say they were. I am saying that for some of them it is going to be a pay increase. Yet the contention is made here that this is not a pay increase..

36/ Hearings on H.R. 1871 and related bills, p. 37, supra, note 35.

37/ Id., at 41-42, emphasis added.

MISS HOAGUE: I don't know, as I say, how this figure came into being, but I do know that the teachers are not considering it a pay raise bill.

Thus, not only are the committee reports barren of any indication that the Act was intended to be a pay raise bill, the appellants themselves were of the same persuasion in their testimony to those committees. Indeed, appellants own words were echoed on the floor of Congress by a member of the sponsoring subcommittee who was present at the hearings. Congressman Foley stated in regard to the Act (105 Cong. Rec. 12711):

> It is to be emphasized that [the proposed Act] in no way represents a pay-raise measure. The primary purpose is to provide a personnel program for teachers in schools for dependents of Federal Employees overseas which is more appropriate to their profession than the existing loosely planned and unsuitable system. The practical effect will be to eliminate a number of inequities and certain administrative problems caused by the present program, which have produced justifiable complaints from the teachers.
>
> * * *
>
> So far as concerns compensation, the pay of the overseas teachers will continue to be fixed at appropriate levels by the administrative authorities concerned, but in no event will exceed the compensation for teaching positions of comparable responsibility in the District of Columbia school system. Representatives of the Department of Defense testified that in practice the pay rates for overseas teachers will be lower than those in the District of Columbia.

4. The contemporaneous administrative interpretation of the Act is contrary to the position appellants urge here. As we developed above, neither the language of the Act nor its legislative history, nor indeed appellants' own initial understanding of its purpose, supports the proposition that the Act was intended to afford periodic, mandatory pay raises to overseas teachers. However, we are in full accord with appellants' suggestion (Br. p. 19) that "peculiar weight"

should be given to "a contemporaneous construction of a statute by the men charged with the responsibility for setting its machinery in motion." Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315. We therefore examine that material as well.

Contemporaneous administrative construction of the Act is found in the Department of Defense instructions, Salary Determination Procedures, Overseas Dependents School Teaching Positions, Class 1 (J.A. 9-12). Appellants themselves rely on these Procedures to calculate the amount of salary increase to which they believe themselves entitled under the Act (Br. pp. 4-7). In those instructions, the Secretary of Defense interpreted the Act liberally. He believed that it gave him discretion to raise the overseas teachers' compensation to comparable United States levels, but that, far from being mandatory, such raises depended upon a Congressional increase in the per pupil limitation placed on the School System expenditures sufficient to authorize ample funds for him to place them into effect.[38/] The administrative construction of the Act, too, does not support appellants position. Moreover, Congress has concurred in the Secretary's interpretation of the Act.

38/ Procedures, paragraph 3.

Salary data for teaching positions will be obtained and analyzed on a timely basis and the results will be utilized to seek adjustment in the per pupil limitation sufficient to permit warranted increases in the compensation schedule.

COMMENT: It must be recognized that the per pupil limitation established by the Congress determines the maximum amount which can be spent in the operations of the dependents schools. Since salaries comprise a substantial part of operating costs it is expected that in the future the per pupil limitation will have to be increased before salaries can be adjusted. The most appropriate time to start administrative action to obyain an increase in the per pupil limitation in in August of each year, the time at which final budget preparation for the following fiscal year commences. This means that determination as to warranted salary adjustments must be made in July of each year.

(Cont'd.)

5. Congress has accepted the Secretary's interpretation of the Act. As we outlined above, pp.1-7, the Overseas Dependents School System rests not on permanent legislation but rather on annual authorizations contained in the Defense Department appropriations measures. Both before and after the legislation in question here was enacted, Congress has included in each of those provisions a limitation on the average sum per student which could be expended on the School System.[39] The Department of Defense is limited as a matter of law to contain its expenditures within the fund determined by multiplying the number of pupils in the system by that limiting figure.[40] The items to be covered by that fund were initially designated by the Department. However, Congress has expressly insisted that the Department continue to use that criterion without change, only last year thwarting an attempt by Defense to remove certain items from inclusion under the per pupil limitation.[41]

When the Overseas Teachers Pay and Personnel Practices Act was initially passed, as appellants concede (J.A. 5), Congress increased the per pupil limitation sufficiently to allow the Secretary to establish the salary scale for overseas teachers as contemplated in the Procedures. However, teachers' salaries in the United States have risen steadily since then. Each year representatives

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38/ (Cont'd) Paragraph 5

When the per pupil limitation is know, final determination as to an appropriate adjustment will be made. Adjustments in the compensation schedule will be made coincident with the beginning of the school year.

CONCENT 1: It is planned that if the per pupil limitation is increased sufficiently to effect adjustments as provided above, such adjustments will be ordered into effect. There may be times, however, where the per pupil limitation will permit only part of the adjustment being made effective. Final determination of the adjustment, therefore, should await decision on the per pupil limitation.

39/ See notes 2 and 3, supra, p. 2 .
40/ H.R. Rep. No. 2104, 84th Cong., 2d Sess., p. 22.
41/ S. Rep. 1238, 88th Cong., 2d Sess., pp. 17-18, July 24, 1964.

of the Department of Defense have explained the matter fully to Congress and asked for an increase in the per pupil limitation sufficient to allow an increase in the overseas teachers' salaries.[42] Except for fiscal 1964, when a sufficient increase to allow an across-the-board salary increase of $100 annually was granted, Congress has refused to accede to the Department's requests. The reason for that continual refusal is not hard to discover. Correctly or otherwise, Congress believes the present overseas teachers' salary scale to be adequate, particularly in view of the fact that the Defense Department has no difficulty recruiting new teachers.[43]

42/ See, for example, the printed Hearings Before the Subcommittee on Department of Defense Appropriations of the House Committee on Appropriations, 87th Cong., 1st Sess., Part 6, pp. 138-150; 87th Cong., 2d Sess., Part 3, pp. 718-722; 88th Cong., 1st Sess., Part 4, pp. 981-1007; 88th Cong., 2d Sess., Part 2, pp. 633, 656.

43/ See, e.g., Hearings on H.R. 10939 before the Subcommittee on Department of Defense Appropriations of the Senate Committee on Appropriations, 88th Cong., 2nd Sess., Part 2, pp. 765-766, relating to the fiscal year ending June 30, 1965.

> Senator SALTONSTALL. Did we not give an increase in teacher's salaries last year?
>
> Mr. VANCE. We have given one $100 increase over the last 4 years, sir. That is all we have given.
>
> Senator RUSSELL. In understand the very great interest of our educational associations in adequate salaries for these teachers and particularly the teachers' associations who feel that the Government should not delay the provision of the funds which they deem necessary.
>
> As one who lives in a small town and in the country and sees the operations of schools in the area, it is amazing to me the number of the best teachers in these schools who want to leave them and to go overseas to teach. They get about an average salary where they are. There seems to be some extra inducement. I do not know if it is because of a plurality of males in uniform, or what it is. There is something which attracts them in large numbers.
>
> Mr. VANCE. Yes, sir, we have had no shortage of applications.
>
> Senator RUSSELL. And they are qualified teachers, I assume?
>
> Mr. VANCE. Yes, sir.

The Congress thereafter again rejected Defense's request for a $10.00 raise in the per pupil limitation for the purpose of providing a further salary increase to teachers. See H.R. Rep. No. 1329, 88th Cong., 2d Sess., pp. 27-28; S. Rep. No. 1238, 88th Cong., 2d Sess., pp. 17-18.

Our point is not that Congress' continuing refusal to raise the per pupil limitation per se prevents the Secretary from increasing overseas teachers' salaries, although Congress certainly would be free to do so in an appropriation measure if it so desired and has done such things in the past.[44/] Rather, by its regular approval of Defense Department budgets which do not provide for the pay raises that appellants claim to be mandatory, Congress has given recognition to the correctness of the Secretary's conclusion that the Overseas Teachers Pay and Personnel Practices Act does not impose a mandatory requirement for such raises. Cf., Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 319.

In sum, even on the merits appellants cannot prevail. As we have shown, the language of the statutory provision upon which they rely provides neither for periodic reviews of salaries nor for mandatory future increases. The committee reports similarly give no support to the proposition that any such automatic, mandatory pay increases were contemplated. In hearings prior to the passage of the Act, appellants themselves stated it was not a pay raise measure, a statement repeated on the floor of the House by a member of the sponsoring subcommittee. The contemporaneous administrative interpretation is likewise contrary to appellants' position, for it held that pay raises were authorized in the Secretary's discretion, but only if Congress made sufficient additional funds available. And, finally, with full knowledge that the Secretary of Defense was not

44/ United States v. Dickerson, 310 U.S. 554; Belknap v. United States, 150 U.S. 588; United States v. Mitchell, 109 U.S. 146. Cf. Tayloe v. Kjaer, 84 U.S. App. D.C. 183 , 171 F. 2d 343, 344.

according appellants the salary raises they deem mandatory, Congress has declined to appropriate additional funds, has refused the Secretary's repeated requests for same, and has expressed satisfaction on more than one occasion with the present salaries of overseas teachers.

We therefore submit that the interpretation which appellants would place on 5 U.S.C. 2353 is not only less than "peradventure clear," it is rather strained. We respectfully submit that the Secretary of Defense and the other appellees have acted not merely within their discretion in refusing the pay increases sought, but, indeed, have acted in strict accord with the desires of Congress.

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted,

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MARCH 1965.

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4-28-65
(2)

REPLY BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,132

CHRISTINE MITCHELL, *et al.*,

Appellants

v.

ROBERT S. McNAMARA, *et al.*,

Appellees

On Appeal From the United States District Court for the District of Columbia

HENRY B. WEAVER, JR.
WILLIAM B. BEEBE
HERSHEL SHANKS
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,132

CHRISTINE MITCHELL, CECIL DRIVER, JOHN ALIANO,
NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES,
a corporation, and
OVERSEAS EDUCATION ASSOCIATION,
an unincorporated association,

Appellants,

v.

ROBERT S. McNAMARA,
Secretary of Defense of the United States,
STEPHEN AILES,
Secretary of the Army,
PAUL H. NITZE,
Secretary of the Navy,
and
EUGENE M. ZUCKERT,
Secretary of the Air Force,

Appellees

REPLY BRIEF

The positions taken by appellees in their brief on appeal significantly narrow the issues which the Court must decide.

I.

Appellees do not dispute that the legislative history of the Teachers Pay Act demonstrates the intent of Congress to make ODS teacher salaries generally equal to U. S. teacher salaries. Appellees do not dispute that the Teachers Pay Act expresses, in mandatory language, the requirement that ODS teachers' salaries be set in accordance with the statutory standard. Appellees point to nothing in the language or history of the per pupil limita-

tion which demonstrates a Congressional intention that this appropriations act provision should override the substantive legislation of the Teachers Pay Act. Appellees fail to cite, let alone discuss, *Ballou v. Kemp*, 68 App. D.C. 7, 92 F.2d 556 (1937),[1] in which this Court rejected a strikingly similar contention that a failure to comply with substantive legislation was excused by an alleged failure of Congress to appropriate the necessary funds.

Appellees' major argument on the merits is that this suit must fail because appellants have not demonstrated that the Teachers Pay Act was intended to require that ODS teachers be given periodic pay raises. They do not dispute that the Act required appellees initially to fix salaries in accordance with the statutory standard, but contend that there is no continuing obligation to maintain this level. In support of their argument, they cite the legislative history of the Teachers Pay Act which indicates that it was not intended to be a pay raise bill. However, appellants have never claimed that the purpose of the Teachers Pay Act was to grant periodic pay raises to ODS teachers.[2] Appellants do claim that Congress intended to establish a machinery for setting ODS teacher salaries which would make such salaries generally equal to U. S. teachers' salaries. In any given case, this might lead to a pay raise, a pay reduction, or no change in pay, depending upon the level of U. S. teacher salaries.

Appellees point to nothing in the language of the Act to support the argument that the statute could be complied

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[2] Appellees make much of a statement made by an official of appellant, Overseas Education Association, at the time Congress was considering the Teachers Pay Act in 1959. This official stated that ODS teachers did not consider the Act a pay raise bill. (Appellee's Brief, pp. 38-39; all page references to appellees' brief are to appellees' typewritten brief.) The attempt to warp this 1959 statement concerning the effect of this Act in terms of 1959 salaries into an interpretation of the Act's continuing effect hardly merits serious consideration.

[1] See Appellants' Brief, pp. 12-13. All page references to appellants' brief are to appellants' printed brief.

with by initially fixing ODS salaries in accordance with the statutory standard and thereafter ignoring what happened to teachers' salaries in the United States. The language of the Act must logically be read as requiring that the relationship between ODS and U.S. salaries be continuing. Appellees point out that mandatory periodic pay raises are not provided for under the Classification Act. (Appellees' Br., p. 33). However, the scheme of the Classification Act is entirely different from that of the Teachers Pay Act. The Classification Act contains fixed dollar amounts for each level of the General Schedule. If Congress had wished to fix ODS teacher salaries at a certain level not subject to change without further Congressional action, it could have set specific amounts in the Teachers Pay Act. The Teachers Pay Act contains no such fixed dollar amounts, however. Rather, salaries are to be fixed by reference to a standard. The express purpose for using this standard was to put ODS teachers on a par with U.S. teachers. See Appellants' Brief, pp. 12, 13. There was no indication that this was intended to be a static relationship, that ODS teachers were to be paid as U.S. teachers were in 1959, and that any change would require Congressional action. Rather, it was implicit in the entire discussion of the Act, and in the language used, that the relationship was to be continuing.

This conclusion is reinforced when the alternative is considered. If Congress intended that once salaries were set in accordance with the statutory standard, no further change was required until it acted, what would any new act providing a salary increase provide? It would have to express the same thought in the same language as is already contained in the Act. That is, it would merely say that ODS teachers' salaries shall be fixed in relation to U.S. salaries. This is an essentially meaningless result.

When appellees issued their regulations implementing the Act, the first paragraph of the regulations provided: "The compensation schedule will be reviewed annually." Salary Determination Procedures, ¶1, Appendix to Appellants Brief, p. 51. This surely reflects appellees' understanding of the Teachers Pay Act.

Appellees seek to escape their own reading of the Teachers Pay Act by pointing to language in their regulations which provides that raises called for by this annual review shall not be given unless the per pupil limitation is increased. (Appellees' Brief, p. 40). The error in appellees' position is apparent. Their reading of the Teachers Pay Act was accurate and correct and appellants are entirely in accord with their interpretation of it as embodied in their regulations. However, appellees erred in their interpretation of the relationship between the per pupil limitation and the Teachers Pay Act. That the per pupil limitation does not relieve appellees of the obligations imposed by the Teachers Pay Act is the major thrust of appellants' argument.[3] The mandatory language of the Teachers Pay Act, the fact that the per pupil limitation was in existence *in haec verba* long before the enactment of the Teachers Pay Act, the fact that the two pieces of legislation are not mutually contradictory, this Court's rejection of the appellees' argument in *Ballou v. Kemp* — all demonstrate that the per pupil limitation does not repeal, or relieve appellees of their obligations under, the Teachers Pay Act. Appellees can find no comfort in a regulation based on a misconceived interpretation of the per pupil limitation. Any provisions in the regulations which is in derogation of the statutory mandate to fix salaries in accordance with the standard is inherently a nullity.

II.

In their jurisdictional argument, appellees concede that this is not a suit against the Government itself if it involves:

> "(1) Actions by officers beyond their statutory powers." (Appellees' Br., p. 20)

More important, appellees also concede that this principle is applicable here if "ministerial duties of a nondiscriminatory nature are involved." (Appellees Br., p. 21). Hence, the jurisdictional question reduces itself to whether a non-discretionary act is sought to be compelled.

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[3] See Appellants' Brief, pp. 20-30.

To support their contention that appellants seek to interfere in highly discretionary matters, appellees place their chief, if not their sole, reliance on the ruling of the Supreme Court in *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309 (1958). The appellees claim that in the present case, as in the *Panama Canal* case, "the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms."

In so arguing, appellees fail to recognize the proper bounds of their discretion. In most statutory schemes, as in this one, the legislature leaves many decisions to the agency which is to administer the program. Other decisions, the legislature makes for itself. The decisions which the legislature leaves to the administration almost always involve the exercise of judgment and discretion. In those areas, the courts will not interfere unless, of course, the administrator acts arbitrarily or capriciously. However, as to those decisions which the legislature itself has made, the administrator has no discretion. He must follow the statutory command. If he does not, a court will order him to do so.

The *Panama Canal* case is one in which the court quite properly refused to interfere in the area of judgment and discretion left to the administrator. The dispute in that case involved the level of the tolls to be charged for use of the Panama Canal. Congress had enacted a standard by which the toll level was to be determined.

That standard was fraught with language indicating the broad discretion given to the Panama Canal Company. The standard, set forth in the footnote below,[4] contained such

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[4] "Section 412(b) provides the formula which petitioner must employ in computing new tolls:
'Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial

(*Continued on following page*)

phrases as "as nearly as practicable", "substantial weight", and "estimated gross revenues." Essentially, the standard called for the application of complex and involved accounting principles and the respondents, users of the Canal, contended that the Company had not applied these accounting principles properly. They asked the Court to intercede directly into these accounting matters.

In short, there was no agreement between the parties, as there is here, that the statutory standard was not being applied. The question in the *Panama Canal* case was whether the standard, which the parties agreed was to be applied, was being *properly* applied. This question involved matters of the greatest discretion.

In contrast, appellants here do not seek to interfere with matters which Congress left to appellees' discretion. Appellants do not complain that the content of appellees' interpretation of the statutory standard was in error. For instance, appellants make no claim that the use of cities of 100,000 or more for comparison purposes was improper. They complain because appellees have admittedly refused to apply that statutory standard. It is clear that the Act makes application of that standard mandatory.[5]

If, in the *Panama Canal* case, the Company had made the judgments and determinations assigned to it by Congress and if, in accordance therewith, the tolls should have been set at "X" level, but in spite of these facts, the Company had charged tolls at "Y" level, the *Panama Canal* case would be similar to the case at bar. This was not the situation in the *Panama Canal* case, however. It is the case here.

(*Continued from preceding page*)
weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.'" 2 L.Ed. at 791.

[5] See appellants' brief, pp. 11-20.

This case does not fall within the holding of the *Panama Canal* case, but within a case thoroughly consistent with *Panama Canal* which was decided in the same term. *Harmon v. Brucker*, 355 U.S. 579 (1958). In *Harmon v. Brucker*, the court took jurisdiction, recognizing that in a matter involving wide discretion, *i.e.*, the issuance, *vel non*, of an honorable discharge, there were some aspects of the final determination as to which there was no discretion since Congress itself had made the decision. The particular matter sought to be compelled there had not been left to the administrator's discretion, namely, whether records concerning pre-induction conduct were relevant to a determination of the kind of discharge to which a serviceman was entitled.

In the statutory scheme in the case at bar, Congress has given the administrator much discretion while making other decisions itself. The size of the school systems to be used in determining teacher salaries, the experience levels of teachers to be compared, the length of the overseas school year, and a host of other matters are left to the good judgment and sound discretion of the administrator. One item was not left to his judgment, however. That decision Congress made for itself. ODS teachers salaries must be fixed on a level generally equal to comparable teachers' salaries in the United States. Here the administrator has exercised his judgment and discretion in the areas properly open to him and computed the amount ODS teachers should be paid according to the statutory formula, but he has refused to set teachers' salaries pursuant to this computation. The fact which takes the instant case out of the *Panama Canal* case and brings it within *Harmon v. Brucker* is the fact that plaintiffs seek to compel compliance with an element in the statutory scheme as to which there is no discretion.

The other contentions urged by appellees in support of their jurisdictional argument are equally unavailing.[6] At

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[6] Appellees' arguments concerning the treatment by Congress of Defense Department requests for increases in the per pupil limitation are treated at pp. 26-27 of Appellants' Brief.

pp. 27-29 of their brief, appellees seek advantage from the provisions of 5 U.S.C. §2352, a section of the Teachers Pay Act. Appellees point out that this section sets forth ten subjects concerning which the Secretary of Defense is required to issue regulations. Appellees claim that nine of these are matters clearly subject to the discretion of the Secretary. Hence, appellees argue, it must be concluded from this context that the tenth matter covered in Section 2352, subparagraph (a)(2), which deals with teachers' salaries, must also be subject to the Secretary's discretion.

In fact, examination of the language of Section 2352 leads to the opposite conclusion. The section does indeed list a number of subjects which are clearly left to the Secretary's discretion. However, there is one subject, and only one, where the section goes beyond the mere listing of a subject matter and sets forth a specific standard which must govern the Secretary's action. That subject is teachers' salaries. Subparagraph (a)(2) does not merely provide that the Secretary shall issue regulations governing the fixing of teachers' salaries. It provides that these salaries shall be fixed "in relation to the rates of basic compensation for similar positions in the United States."

In the context of Section 2352, it can only be concluded that Congress intended that the Secretary's discretion as to salaries be limited. That conclusion is reinforced indisputably when it is realized that Congress repeated this command, in clearly mandatory language (See Appellants Br., pp. 13-18), in the very next section of the statute, 5 U.S.C. §2353(c).[7]

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[7] "(c) Rates of basic compensation. The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia."

Appellees conclude their argument on their jurisdictional question with the contention that the cases relied on by appellants do not support the claim that mandamus is available here. (Appellees' Brief, pp. 30-32) Appellants believe that *Clackamas County, Ore. v. McKay,*[8] *Udall v. Wisconsin, Colorado and Minnesota* [9] and *West Coast Exploration Co. v. McKay,*[10] are all valid statements of the law pertaining to suits of the nature here involved and that these cases are correctly relied upon in appellants' brief. Appellees cannot avoid the fact that in the *Clackamas* and *Udall* cases, the Court exercised its jurisdiction despite the obvious fact that a measure of statutory interpretation was called for and that in *Clackamas,* the Court referred to an attempt, similar to that made here, to rely on the need for statutory interpretation as a bar to jurisdiction as a "bootstraps" argument (219 F.2d at 495) not meriting serious consideration.

CONCLUSION

Appellees have not seriously disputed that the Teachers Pay Act imposes a mandatory requirement that ODS salaries be fixed so that they generally equal U.S. teachers' salaries. Appelles make no claim that present ODS salaries are equal to present U.S. salaries, but claim that

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[8] 94 U.S. App. D.C. 108, 219 F.2d 479 (1954) *dismissed as moot,* 349 U.S. 909 (1955).

[9] 113 U.S. App. D.C. 183, 306 F.2d 790 (1962), *cert. denied,* 371 U.S. 969 (1963).

[10] 93 U.S. App. D.C. 307, 213 F.2d 582 (1954), *cert. denied,* 347 U.S. 989. In its detailed discussion of the applicable law, this case clearly states that the courts have jurisdiction in cases seeking mandatory relief compelling the performance by a Federal officer of a legal duty (213 F.2d 592), and that such jurisdiction exists in cases involving Government property (213 F.2d at 594-596). What appellees apparently "do not quite understand" (Appellees Br., p. 31) is that these principles are no less valid even though their application in the West Coast Exploration case itself led to the conclusion that jurisdiction was lacking.

there is no requirement that the relationship called for by the Teachers Pay Act be maintained. Appellees point to nothing directly supporting their position. The language and history of the Teachers Pay Act are entirely consistent with the interpretation that a continuing relationship is called for and this is, by far, the most logical interpretation. It is the interpretation adopted by defendants when they implemented the Act and its force is not lessened by their misreading of another act, *i.e.*, the per pupil limitation provision of the Appropriations Act. Since appellants seek only to compel appellees to do what the Teachers Pay Act requires them to do, the court has jurisdiction to grant the relief sought.

For these reasons, the Court should resolve the limited outstanding issues in accordance with the position expressed in appellants' brief.

Respectfully submitted,

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